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No. 05

In the Supreme Court of the United States

SAMUEL RILEY, THOMAS SNYDER and MARK PIERSON,

Petitioners,

v.

ROD R. BLAGOJEVICH and ROGER WALKER, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Seventh Circuit reversed the decisions of the District Courts in Riley v. Blagojevich and Mark Pierson v. Blagojevich denying the defense of qualified immunity at the motion for judgment on the pleadings stage of the proceedings and affirmed the decision of the District Court in Snyder v. Blagojevich granting the defense of qualified immunity after converting a motion for judgment on the pleadings to a motion for summary judgment. The claims at issue challenged the patronage and retaliatory terminations of State of Illinois, Department of Corrections low level professional, technical and administrative employees without policy making or discretionary decision making authority that occupied positions with well defined and limited objectives that were constrained by law and supervisor approval. Samuel Riley, Thomas Snyder and Mark Pierson (collectively "Petitioners") assert that political affiliation was not an appropriate or reasonable requirement for the effective performance of their duties and responsibilities and that each spoke out on matters of public concern, including violations of the law by government officials, misuse of taxpayer funds and significant public safety issues all unrelated to their job duties or their political viewpoints. In holding that the claims be dismissed the Seventh Circuit's decision directly conflicts with the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, previous holdings of the Supreme Court of the United States, previous holdings of the Seventh Circuit, as well as, with holdings of the First, Second, Third, Fourth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits

Three (3) questions are presented.

1. Did the Seventh Circuit err when it failed to conduct any analysis, including the analysis required by Pickering v. Board

of Education, 391 U.S. 563 (1968), when it entered judgment in favor of the Governor Rod Blagojevich and Illinois Department of Corrections Director Roger Walker, Jr. (collectively "Respondents") in each case on First Amendment free speech retaliation claims asserted by Petitioners, by simply finding that each claim was "merely a restatement of their claim that political affiliation is a forbidden criteria" for the positions at issue ?

2. Did the Seventh Circuit err by expanding the narrow exception to the constitutional prohibition against termination of public employees reserved for high level policymaking positions established by Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), Branti v. Finkel, 445 U.S. 507 (1980) and Elrod v. Burns, 427 U.S. 347 (1976) and applying a new and broad safe harbor standard to low level state employees and when it relied exclusively on disputed job description documents presented by Respondents ?

3. Did the Seventh Circuit err when it entered judgment in favor of Respondents in each case based on issues, arguments or grounds for appeal presented for the first time on appeal and based on matters outside of the pleadings, including stipulations, affidavits, purportedly public records and citations to Illinois law without first allowing each Petitioner a reasonable opportunity to present all material pertinent to the issues ?

LIST OF PARTIES

The Petitioners were the plaintiffs in the District Court cases and were individual employees of the State of Illinois, Department of Corrections Samuel Riley, Thomas Snyder and Mark Pierson. The Respondents were the defendants in the District Court cases and were Rod R. Blagojevich, Governor of the State of Illinois and Roger Walker, Jr., Director of the Illinois Department of Corrections.

CORPORATE DISCLOSURE STATEMENT

Samuel Riley, Thomas Snyder and Mark Pierson are all individuals.

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2 Ill.Admin.Code 850, Tables A, I-M 2, 19
80 Ill.Admin.Code 301.20 . . . . . 2, 9, 26, 29

OPINIONS BELOW

The consolidated opinion of the United States Court of Appeals for the Seventh Circuit in the matters of Riley v. Blagojevich and Snyder v. Blagojevich is reported at 425 F.3d 357 (7th Cir. 2005) and reprinted in Appendix B hereto, pp. 3a-19a, infra. The decision denying the Petition for Rehearing *En Banc* in Riley v. Blagojevich and Snyder v. Blagojevich is reported at No. 04-3085 and 04-3436, 2005 U.S. App. LEXIS 25292 (7th Cir. Nov. 18, 2005) and reprinted in Appendix A hereto, pp. 1a-2a, infra. The consolidated opinion Riley v. Blagojevich, 425 F.3d 357 reversed the decision of the district court in Riley v. Blagojevich, reported at No. 04 C 1296, 2004 U.S. Dist. LEXIS 14706 (N.D.Ill. July 29, 2004) and reprinted in Appendix C and D hereto, pp. 20a-36a, infra., and affirmed decisions of the district court in Snyder v. Blagojevich, reported at 332 F.Supp.2d 1132 (N.D.Ill. 2004) and reprinted in Appendix E-F hereto, pp. 37a-58a, infra., and Snyder v. Blagojevich, No. 04 C 1291 (N.D.Ill. June 4, 2004) and reprinted in Appendix G hereto, pp. 59a-62a, infra. The opinion of the Seventh Circuit Mark Pierson v. Blagojevich reversing the decision of the district court was originally issued as an unpublished opinion, but was later issued as a published opinion and reported at No. 05 3019, 2005 U.S. App. LEXIS 29328 (7th Cir. December 20, 2005) and reprinted in Appendix H hereto, pp. 63a-65a, infra. The decision of the district court in Mark Pierson v. Blagojevich, No. 04 C 939 (N.D. Ill. June 24, 2005) is reprinted in Appendix I hereto, pp. 66a-80a, infra.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The United States Court of Appeals for the Seventh Circuit had jurisdiction of these cases under 28 U.S.C. § 1291. In the

Riley v. Blagojevich and Mark Pierson v. Blagojevich the Seventh Circuit considered interlocutory appeals based on the denial of qualified immunity defenses. In the Snyder v. Blagojevich matter the Seventh Circuit considered an appeal of a final judgment.

The district court had jurisdiction under 42 U.S.C. § 1983, 28 U.S.C. § 1331 and 1343.

The consolidated opinion of the United States Court of Appeals for the Seventh Circuit in the matters of Riley v. Blagojevich and Snyder v. Blagojevich was rendered on September 23, 2005. The Petition for Rehearing *En Banc* was denied November 18, 2005.

The opinion of the Seventh Circuit Mark Pierson v. Blagojevich was rendered on December 20, 2005, and the published opinion was issued on February 10, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

Amendments I and XIV

Federal Statutory Provisions

42 U.S.C. § 1983

State of Illinois Statutory Provisions

20 ILCS 415/8a(1)

20 ILCS 415/10(4)

20 ILCS 415/14. "The records of the Department [of Central Management Services], ... shall be public records and shall be open to public inspection, ..."

2 Illinois Administrative Code 850, Tables A, I-M

80 Illinois Administrative Code § 301.20

The relevant Constitutional and statutory provisions are sometimes lengthy and, therefore, those not set forth above are set out in Appendix J hereto, pp. 81a-83a, infra., pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASES

The cases of Riley v. Blagojevich and Mark Pierson v. Blagojevich were decided based on the standards for motions for judgment on the pleadings under Federal Rule of Civil Procedure 12(c)("Rule 12(c)"). The Snyder v. Blagojevich case was decided based on the standards for motions for summary judgment under Rule 12(c) and Federal Rule of Civil Procedure 56 ("Rule 56").

The Petitioners in these cases, Samuel Riley ("Riley"), Thomas Snyder ("Snyder") and Mark Pierson ("Pierson")(individually "Petitioner" and collectively "Petitioners") are all former employees of the State of Illinois, Department of Corrections. Pierson was employed for over twenty-four (24) years, Riley was employed for over twenty-three (23) years and Snyder was employed for over seven (7) years prior to their respective terminations. Each Petitioner held a variety of positions for the Department of Corrections gaining personal experience regarding the duties and responsibilities of the positions at issue and having received meritorious promotions throughout the years, including promotion to their respective positions having titles and labels of assistant wardens and warden. Riley and Snyder were each terminated from positions as assistant wardens, and Pierson was terminated from the position of warden. It is undisputed that Riley and Snyder were but two (2) of at least sixty-three (63) assistant wardens and Pierson was one (1) of at least thirty-one (31) wardens. It is also undisputed that the Petitioners were among two hundred seventeen (217) positions within the Department of Corrections and among over one thousand five hundred (1,500) positions throughout the State of Illinois which Governor Rod Blagojevich considered exempt from constitutional protection. Additionally, it cannot be disputed that there are in excess of two thousand five hundred (2,500) positions within the Department of Corrections having the same Illinois

Department of Central Management Services pay and position classification as the positions at issue, and close to six thousand five hundred (6,500) additional positions within the Department of Corrections with a similar Illinois Department of Central Management Services pay and position classification and having similar duties and responsibilities as the positions at issue, including more than one hundred (100) Illinois Department of Corrections employees having "Duty Warden" responsibilities. Moreover, it is undisputed that none of the Petitioners acted as an advisor or confidant to Governor Rod Blagojevich or his administrative staff and that each Petitioner acted under specific administrative directives from their immediate superiors.

Each Petitioner has asserted that the duties and responsibilities of the respective positions at issue were inherently professional, technical and administrative in nature without policy making, autonomous or discretionary decision making authority, including no hiring, firing or significant budgetary authority. The inherent duties and responsibilities of each position involved professional, technical and administrative supervision and monitoring of operations and/or programs and staff and the conduct of routine facility inspection tours. Each Petitioner also asserted that he occupied a position with well defined and limited objectives that did not include participation in determining policy which fixed objectives, or stated principles to control action toward operating objectives, or toward the conduct of the Department of Corrections, any Department of Corrections district, or the specific institutions or any other administrative unit immediately subordinate to Governor Rod Blagojevich or his administrative staff. Additionally, each Petitioner asserted that he did not act authoritatively on any policy-making issue or have meaningful input into government decision making on issues where there was room for principled disagreement on goals or their interpretation, but the actions of each Petitioner were at all times subject to multiple levels of management review and tightly constrained by federal, state and department

statutes, regulations and rules. Finally, each Petitioner asserted that he was terminated because he was not a member of the Democratic Party or a political ally of the Democratic administration despite the assertion by the Petitioners that political affiliation was not an appropriate or reasonable requirement for the effective performance of his duties and responsibilities.

In the alternative and independent of the political affiliation claim, each Petitioner asserted, and it is undisputed, that he was terminated because he spoke out on matters of public concern, including violations of the law by government officials, misuse of taxpayer funds and significant public safety issues all unrelated to his job duties or his political viewpoints. Petitioners spoke out against violations by State of Illinois employees of federal and state requirements for filling employment vacancies and unlawful interference of labor and other non-governmental organizations in the process of filling employment vacancies. Petitioners also spoke out against misuse of taxpayer funds by Governor Rod Blagojevich and Department of Corrections Director Roger Walker, Jr. (collectively "Respondents"), as well, as significant public safety issues resulting from the activities of Respondents, including the failure to staff facilities at appropriate levels, with qualified personnel, without interference from organized labor.

The Petitioners filed suit under 42 U.S.C. § 1983 and 28 U.S.C. § 1331 and 1343 asserting claims in independent an alternative counts that the terminations due to their political affiliation and speech on matters of public concern had violated their First Amendment rights to freedom of speech and freedom of association as applied to the states by the Fourteenth Amendment to the United States Constitution.

In each of the cases the Respondents filed a motion for judgment on the pleadings pursuant to Rule 12(c) contemporaneously with their answer to the complaint and before any discovery had occurred. Each answer filed by the Respondents included as an attachment a single position

description document purporting to be an "official, written position description maintained as a public record under Illinois law by the Illinois Department of Central Management Services" and no other specific relevant assertions regarding the patronage or retaliatory dismissal claims. Most notably absent from the answer are the several predecessor position descriptions and evidence to support references to Illinois law relied upon by the Seventh Circuit.

In each of the cases Respondents filed essentially identical motions for judgment on the pleadings. Respondents would later withdraw the motion for judgment on the pleadings in Mark Pierson v. Blagojevich and file a renewed motion for judgment on the pleadings after the Seventh Circuit decided a warden case in favor of the plaintiff in Kiddy-Brown v. Blagojevich, 408 F.3d 346 (7th Cir. 2005). The District Court in Mark Pierson v. Blagojevich would eventually convert the renewed motion for judgment on the pleadings to a motion for summary judgment, which order was subsequently vacated after Pierson and the Respondents jointly requested that the District Court decide the issue presented by the renewed motion for judgment on the pleadings based solely on the pleadings consisting of the complaint and answer of record. Each of the memoranda filed by Respondents in support of the motions for judgment on the pleadings specifically requested that the District Courts consider the position description documents without converting the motion for judgment on the pleadings into a motion for summary judgment under Rule 56.

It is undisputed that Snyder submitted an affidavit pursuant to the order of the District Court converting the motion for judgment on the pleadings into a motion for summary judgment. The District Court converted the motion because it determined "that the case did not fit under the Rule 12(c) rubric" due to the filings made by the Respondents. The District Court then specifically confined the materials Snyder could present in opposition to the converted motion as follows:

> "If Snyder and his counsel can, in the objective good faith required of every litigant and lawyer under Rule 11(b), dispute that the duties and responsibilities set out in the Position Description were those of the Assistant Warden position at the time Snyder held it, that must be done by an affidavit filed in this Court's chambers [within thirteen (13) days]."

The affidavit filed by Snyder contained a variety of assertions that establish the existence of a genuine and material dispute regarding the facts in Snyder v. Blagojevich sufficient to warrant denying summary judgment for the Respondents. In the affidavit Snyder asserted that he had been employed with the Illinois Department of Corrections for over seven (7) years and that prior to being terminated he had never seen the position description documents. In the affidavit Snyder further stated that upon reviewing the position description documents he determined, and at least five (5) other individuals with personal experience sufficient to provide an opinion concurred with his determination, that the position description documents did not accurately describe the duties and responsibilities inherent in his former position. In the affidavit Snyder also clearly identified the accurate and inaccurate information, including providing examples to support his assertions. For example, the Snyder affidavit asserted the position description did accurately describe that assistant wardens were required to act under administrative directives received from the warden that were specific and of limited scope relating solely to the provision of program services to the inmates incarcerated at the institution and the directives confined and constrained his ability to act with any meaningful discretion and including citation to specific sections of the Illinois Administrative Code limiting his responsibility. Additionally, by way of example, the Snyder affidavit asserted the position description did not

accurately describe the "Duty Warden" responsibility and that the position descriptions could not be considered trustworthy or reliable.

It is undisputed that in each of the cases the Respondents' submitted stipulations and affidavit documents and it is true that the stipulations and affidavits in each of the cases could establish that the Illinois Department of Central Management Services presented numerous position description documents for the assistant warden and warden positions at issue that purportedly came from Illinois Department of Central Management Services files. The stipulations and affidavits support no other assertion. However, the stipulations and affidavits definitively establish that these documents were not part of the pleadings, none of the Petitioners referred to any of the position description documents in the complaints of record, the position description documents do not form the basis for any claim asserted by the Petitioners, none of the Petitioners signed any of the position description documents and Respondent Director Roger Walker, Jr. signed the position description document at issue in Riley v. Blagojevich.

The Respondents filed an interlocutory appeal with the Seventh Circuit based on the denial of the defenses of qualified immunity in Riley v. Blagojevich and Mark Pierson v. Blagojevich, and Snyder filed an appeal with the Seventh Circuit based on the final judgment. When Riley v. Blagojevich and Snyder v. Blagojevich came before the Seventh Circuit the Respondents asserted for the first time in their respective initial Brief and Reply Brief that the position description document attached to the respective answers were,

> "maintained by CMS under the authority conferred on the Director of CMS under the Illinois Personnel Code, 20 ILCS 415/1 et seq. Section 8a(1) of the Code directs and authorizes CMS to (among other things) prepare, maintain, and revise, subject to the approval of the Civil Service Commission, 'a position classification plan for all positions

subject to this Act, based upon similarity of duties performed, responsibilities assigned, and conditions of employment so that the same schedule of pay may be equitably applied to all conditions of employment so that the same schedule of pay may be equitably applied to all positions in the same class.' 20 ILCS 415/8a(1)."

The Respondents also asserted for the first time in the initial Brief in Riley v. Blagojevich that "the CMS Position Description is a document which Illinois law requires CMS to maintain (20 ILCS 415/8a(1) & 8b(b)), and is a public record 'open to public inspection' under Illinois law. 20 ILCS 415/14." The Respondents admitted that the answer purportedly "establishe[d] the official and authentic nature of the Position Description" and that "the statutory CMS authority may not have been described at length in the District Court ... Section 8b was specifically referenced in [the motion for judgment on the pleadings] and the ... Answer clearly stated that the Position Description was 'maintained as a public record under Illinois law by' CMS."

In Mark Pierson v. Blagojevich no briefing or oral argument occurred but the Respondents filed a position statement that relied exclusively on the decision by the Seventh Circuit in Riley v. Blagojevich and Snyder v. Blagojevich. Pierson filed his own position statement containing argument that Kiddy-Brown was controlling and not the decision in Riley v. Blagojevich and Snyder v. Blagojevich.

In each of the cases the Respondents never adduced any evidence or filed written arguments with the District Court or the Seventh Circuit regarding 20 ILCS 415/10(4) and 80 Ill.Admin.Code 301.20, the creation and updating of position description documents by the Illinois Department of Central Management Services, the review and approval of position description documents by the Illinois Civil Service Commission or the purported ability of employees to challenge and request changes to position description documents. Moreover, in Riley v. Blagojevich and Snyder v. Blagojevich the Respondents never

adduced any evidence or filed written arguments with the Seventh Circuit regarding the "Duty Warden" responsibilities or the legal significance of the "Duty Warden" designation.

In addition to the three (3) former employees that petition for the instant writ, there are at least eleven (11) other former employees of the Department of Corrections with cases pending in the District Courts. Among the former employees are six (6) who formerly occupied assistant warden positions, four (4) who formerly occupied warden positions and one (1) who formerly occupied the position of supervisor. Therefore, for the reasons set forth below and to provide clear and definitive guidance to the District and Circuit Courts regarding the pending, as well as, future litigation this Court should allow the writ to decide the questions presented.

REASONS FOR ALLOWANCE OF THE WRIT

Application of the proper analysis to First Amendment free speech retaliation claims and political patronage employment termination claims are important questions that can only be resolved by this Court and guidance is urgently warranted to resolve numerous conflicts among the Circuits on both issues. The cursory analysis (putting the best gloss possible on the "analysis") conducted by the Seventh Circuit regarding the retaliation claims is clearly inconsistent with the mandates of this Court and decisions of the Second, Third, Eighth and Tenth Circuits, as well as, the First and Sixth Circuits and prior decisions of the Seventh Circuit. Moreover, the analysis applied to the political patronage claims is entirely insufficient under established and refined precedent of this Court and conflicts with decisions of the First, Second, Third, Fourth, Sixth, Ninth, Tenth and Eleventh Circuits. The Seventh Circuit stands alone as the only Circuit to find it constitutionally acceptable to terminate prison employees based on political affiliation.

Review by this Court is also necessary to address two (2) additional important issues posed by the decisions of the Seventh Circuit. First, contrary to well established precedent set forth in holdings of the Court the Seventh Circuit entered judgment in favor of Respondents in each case based on issues, arguments or grounds for appeal presented for the first time on appeal without first allowing each Petitioner a reasonable opportunity to present all material pertinent to the issues. Second, contrary to the Federal Rules of Civil Procedure, prior holdings of the Seventh Circuit and a holding in the Third Circuit the Seventh Circuit considered and entered judgment under Rules 12(c) and 56 favor of Respondents based on matters outside of the pleadings, including stipulations, affidavits, purportedly public records and citations to Illinois law and without allowing Petitioners a reasonable opportunity to present pertinent information.

I. Review is warranted to resolve conflicts regarding the analysis required by Pickering v. Board of Education, 391 U.S. 563 (1968) on First Amendment free speech retaliation claims.

The Seventh Circuit clearly erred when it failed to conduct any analysis, including the analysis required by Pickering, when it entered judgment in favor of the Respondents in each case on First Amendment free speech retaliation claims asserted by the Petitioners, by simply finding that each claim was "merely a restatement of their claim that political affiliation is a forbidden criteria" for the positions at issue. The Court has previously called for a distinct inquiry where a government employer takes adverse action on account of an employee's right of free speech, even when the asserted free speech violation is intermixed with an asserted violation of the right of free association, each of which is protected by the First Amendment. O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 719 (1996)(There will be cases where specific

instances of the employee's speech or expression, which require balancing in the Pickering context, are intermixed with a political affiliation requirement. In those cases, the balancing Pickering mandates will be inevitable.); Pickering, 391 U.S. 563. Despite the call for a distinct inquiry a conflict among the Circuits exists regarding the inquiry and that makes this case an appropriate vehicle for this Court to provide clear guidance to the Circuits that when a free speech violation claim is made by a state employee the claim must be reviewed and resolved under the fact specific Pickering analysis without regard to any other independent or alternative claims that are asserted by the state employee.

In the cases at issue the Seventh Circuit conducted no inquiry into the free speech claims asserted by the Petitioners. Without more, the absolute absence of any inquiry, factual or otherwise, mandates that this Court reverse the judgment entered in favor of the Respondents. In an effort to review the decision of the Seventh Circuit, notwithstanding the obvious failure of the Seventh Circuit to conduct any analysis of the free speech claims, the only reasonable determination for this Court to make is that the Seventh Circuit simply applied the standard of the Ninth Circuit disposing of both claims without independent analysis. Biggs v. Best, Best & Krieger, 189 F.3d 989, 994-95 (9th Cir. 1999); Fazio v. City and County of San Francisco, 125 F.3d 1328, 1334 (9th Cir. 1997). However, this determination by the Seventh Circuit is far too broad because the approach fails to recognize that it is not necessarily the case that the government's interest as employer will outweigh the employee's free speech rights in all cases. This approach also conflicts with the clear mandates of Pickering, and the clear and unmistakable inference contained in O'Hare, as well as, the approach taken by a variety of the Circuits. For example, cases with claims raising First Amendment free speech issues in the Second, Third, Eighth and Tenth Circuits are analyzed under the Pickering balancing test regardless of any independent or alternative claims,

including political affiliation claims. Melzer v. Board of Education of the City School District of the City of New York, 336 F.3d 185, 193 (2nd Cir. 2003)(Pickering test ordinarily applies in situations involving speech directed at an employer, made at the place of employment or directly concerning the employer in some way.); Hale v. State of New York Office of Children and Family Services, 219 F.3d 61 (2nd Cir. 2000)(Summary judgment is not appropriate regarding public speech objecting to superiors policies and practices, proper implementation of appropriate facility policies and concerning the proper administration of State facilities for the incarceration of juveniles, including internal facility administration relating directly to the plaintiff's duties and responsibilities by Director of youth correctional facility having policy-influencing position held at the pleasure of the Governor, even if the position is later determined to be a policymaker.); Lewis v. Cowen, 165 F.3d 154, 162 (2nd Cir. 1999)(While an employee could be discharged on the basis of political affiliation, that same employee may not be discharged on the basis of specific speech on matters of public concern unless the Pickering balancing test favors the government employer.); McEvoy v. Spencer, 124 F.3d 92, 101-03 (2nd Cir. 1997); Curinga v. City of Clairton, 357 F.3d 305, 314 (3rd Cir. 2004)(When an employee's speech is intermixed with political affiliation the Pickering balancing standard is the better analysis to apply.); (Hinshaw v. Smith, Nos. 05 1205, 05 1217, 05 1218, 2006 U.S. App. LEXIS 2240 * 19-25 (8th Cir. January 30, 2006); Barker v. City of Del City, 215 F.3d 1134, 1139 (10th Cir. 2000)(Supreme Court in O'Hare implicitly rejected the position that a political affiliation employee can be terminated for her speech without the need to consider the Pickering balancing formula.); Jantzen v. Hawkins, 188 F.3d 1247, 1251 (10th Cir. 1999)(We address separately a political association claim and a free speech claim raised by the same employee.). The Petitioners assert that the

standard applied by these Circuits is most appropriate under O'Hare and Pickering.

A further conflict exists with the First, Sixth and, until the decisions in the instant cases, Seventh Circuits, that apply the Pickering balancing test only to speech by policymaking employees that is unrelated to the duties of the position or the employee's political viewpoints. Flynn v. City of Boston, 140 F.3d 42, 46-7 (1st Cir. 1998); cf. Padilla-Garcia v. Rodriguez, 212 F.3d 69, 78-80 (1st Cir. 2000); Rose v. Stephens, 291 F.3d 917, 922 (6th Cir. 2002); Vargas-Harrison v. Racine Unified School District, 272 F.3d 964, 971-72 (7th Cir. 2001); Bonds v. Milwaukee County, 207 F.3d 969, 979 (7th Cir. 2000); Ryan v. Illinois Department of Children & Family Services, 185 F.3d 751, 759 (7th Cir. 1999); Marshall v. Porter County Plan Commission, 32 F.3d 1215, 1219-20 (7th Cir. 1994); Wilbur v. Mahan, 3 F.3d 214, 217 (7th Cir. 1993). Even under this modified approach a fact specific inquiry must be conducted to determine whether the speech at issue was related to the duties of the position at issue or implicated political viewpoints. The finding by the Seventh Circuit in the instant cases that each claim was "merely a restatement of their claim that political affiliation is a forbidden criteria" does not satisfy any established evaluation criteria under Pickering. Therefore, this Court should allow the writ to decide whether and to what extent the Pickering balancing test should be applied in situations involving separate independent and alternative claims of First Amendment violations of free speech and free association in the context of political affiliation terminations and First Amendment violations of free speech in the context of public concern terminations.

II. Review is warranted to resolve conflicts regarding the application of the analysis required after the decisions in Rutan, Branti and Elrod.

A. Exclusively applying the "policymaker" analysis is not the proper analysis.

The Seventh Circuit clearly erred by foregoing the analysis required under Branti and simply conducting the "policymaker" analysis of Elrod. The patronage analysis begins with Elrod. In Elrod, a majority of the Court annunciated a "positional" test and held that public employees' political affiliation enjoyed constitutional protection and one could not be dismissed on the basis of party affiliation unless one held a "policymaking" position. Elrod, 427 U.S. at 367. In Elrod, the Court confirmed that political affiliation dismissals violated the Constitution, but carved out a very narrow exception for policymaking positions. Elrod, 427 U.S. at 367. The Court placed the burden of proving the policymaking nature of the position and demonstrating that the political dismissal satisfied constitutional muster on the government. Elrod, 427 U.S. at 355-75 (Government employers may not discharge an employee because of political affiliation without showing a governmental interest sufficiently vital to outweigh the employee's First Amendment right to association. The government's interest in effective implementation of its policies can be achieved by limiting patronage dismissals to policymaking positions.). Thereafter, in Branti the Court reaffirmed the requirement that the government employer has the burden to demonstrate that political affiliation is an appropriate and reasonable requirement for the effective performance of the position at issue. Branti, 445 U.S. at 515-19 (Unless the government can demonstrate an overriding interest of vital importance requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.). In Branti, the Court also further refined

and tightened the very narrow exception recognized in Elrod and added a personal overlay. First. the Court determined that an employee's constitutional rights could only be overridden and dismissed for political reasons if the employee's political beliefs would (not could) interfere with the performance of his duties. Branti, 445 U.S. at 517. Second, the Court re-examined the Elrod positional test and further restricted the already very narrow exception when the Court determined that party affiliation is not necessarily relevant to every policymaking or confidential position. Branti, 445 U.S. at 518. The Court ultimately recast the Elrod test and concluded:

> "The ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

Branti, 445 U.S. at 518. In Rutan, the final case in the trilogy, the Court confirmed the propriety of the prior analysis as set forth in Branti, but further restricted patronage employment practices. In Rutan this Court reaffirmed again the heavy burden on government employers to show that the use of patronage practices are narrowly tailored to further vital government interests. Rutan, 497 U.S. at 74 (A government's interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient. A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views.). In Rutan, the Court conceded that the scope of the Branti exception was not at issue, but nevertheless applied the previous precedent and determined that "[a] government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their

political views." Rutan, 497 U.S. at 74. The Seventh Circuit opinion conflicts with opinions of the Fourth, Tenth and Eleventh that interpret Branti to require a showing by the government that party affiliation was essential to effective performance of a position before an employee can be susceptible to patronage dismissal. Parrish v. Nikolits, 86 F.3d 1088, 1093 (11th Cir. 1996), citing Dickeson v. Quarberg, 844 F.2d 1435, 1443 (10th Cir. 1988); Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984); cf. also Tomczak v. City of Chicago, 765 F.2d 633, 641 (7th Cir. 1985).

The err by the Seventh Circuit in applying only the superceded "policymaker" test of Elrod is much more obvious and therefore presents a more significant problem in the Mark Pierson v. Blagojevich decision. In reaching its decision the Seventh Circuit simply stated that the matter "was controlled by [Riley]", reversed the decision of the District Court and remanded the case with directions to enter judgment for the Respondents. The Seventh Circuit determined "the job description here-even more than the job description of assistant warden at issue in [Riley]-clearly confers policy-making discretion." More specifically the Seventh Circuit considered the "essential functions identified in the job description include directing the overall operations and programs of Pinckneyville Correctional Center, formulating 'policy, procedures, rules, regulations, and institutional directives for employees and inmates,' and planning and approving the facility's budget." This analysis hardly conforms to the analytical mandate that an affirmative showing that political affiliation is an appropriate requirement for the effective performance of the position must be made.

Although the err by the Seventh Circuit in applying only the superceded "policymaker" test of Elrod is less obvious in Riley v. Blagojevich and Snyder v. Blagojevich the problem presented is no less significant. In deciding Riley v. Blagojevich and Snyder v. Blagojevich the Seventh Circuit

went to great lengths to find as a matter of constitutional law that employees such as Riley and Snyder who exercised policymaking duties can be fired on the basis of his political affiliation. However, the Seventh Circuit does not go far enough. The Seventh Circuit failed to identify assertions that could satisfy the burden of the Respondents to establish that party affiliation was essential to effective performance of a position.

B. The Seventh Circuit decision is an inappropriate expansion of the Branti exception.

Moreover, the Seventh Circuit clearly erred with its expansion of the narrow exception to the constitutional prohibition against termination of public employees applicable to high level policymaking positions established by Rutan, Branti and Elrod. Under precedent of the Court and cases applying the precedent in the various Circuits the proper view to the exception established by the trilogy of cases is just that, an exception, to be sparingly granted and narrowly construed to cover situations in which an elected official such as Governor Rod Blagojevich, whose power is delegated to him by the people, has the legitimate expectation that a specific high-level employee in a position where party affiliation is an appropriate requirement for effective performance will loyally implement his policies. The decisions in the trilogy have been found to place severe restrictions and limitations on the practice of political patronage employment decisions and allow the practice only for "high level" positions. Assaf v. Fields, 178 F.3d 170, 175 (3rd Dist. 1999); Akers v. Caperton, 998 F.2d 220, 224 (4th Cir. 1993); Zayas-Rodriguez v. Hernandez, 830 F.2d 1, 3 (1st Cir. 1987).

No one could reasonably doubt that Governor Rod Blagojevich needs a loyal high-level employee in the Department of Corrections. It cannot be disputed that the Director of the Department of Corrections, Roger Walker, Jr., is such an employee. Additionally, it would even be reasonable that

Governor Rod Blagojevich could need more than one (1) loyal high-level employee in the Department of Corrections. In order to satisfy this need it cannot be disputed that the Department of Corrections has two (2) advisory boards, and at least fifteen (15) "Chief" positions, a Director of Staff Development & Training, a Special Assistant to the Director, a Deputy Director of Policy & Recruitment, a Deputy Director of Finance, a Deputy Director of Women & Family Services and two (2) Assistant Deputy Director positions below Governor Rod Blagojevich and Director Roger Walker, Jr. in the hierarchy. 2 Ill.Admin.Code §850, Tables A, I-M. The Respondents assert, and the Seventh Circuit accepted, that twenty-two (22) loyal high-level employee positions in the Department of Corrections is not sufficient. Furthermore, notwithstanding the twenty-two (22) positions set forth above and not including positions on the two (2) advisory boards, the Department of Corrections has six (6) Deputy Director and six (6) Assistant Deputy Director positions below Governor Rod Blagojevich, Director Roger Walker, Jr., the Associate Director Bureau of Operations and the Chief of Operations in the Department of Corrections hierarchy. Id. Again, the Respondents assert, and the Seventh Circuit accepted, that thirty-four (34) loyal high-level employee positions in the Department of Corrections is not sufficient. Therefore, the Respondents assert, and the Seventh Circuit accepted, that Governor Rod Blagojevich requires an additional ninety-four (94) loyal high-level employee positions in the Department of Corrections, comprising at least thirty-one (31) Warden positions and at least sixty-three (63) Assistant Warden positions. This Court should note that the Warden and Assistant Warden positions are not even listed in the organization documents.

However the analysis does not end there, it is also undisputed that the Petitioners were among two hundred seventeen (217) positions within the Department of Corrections which Governor Rod Blagojevich considers exempt from constitutional protection. Additionally, it cannot be disputed, based on the same type of

Illinois Department of Central Management Services position description documents presented by the Respondents and relied upon by the Seventh Circuit, that there are in excess of two thousand five hundred (2,500) positions within the Department of Corrections having the same pay and position classification as the positions at issue, and close to six thousand five hundred (6,500) additional positions within the Department of Corrections with a similar Illinois Department of Central Management Services pay and position classification having similar duties and responsibilities as the positions at issue, including more than one hundred (100) Illinois Department of Corrections employees having "Duty Warden" responsibilities. This new standard is not restricted to Illinois Department of Corrections employees but will find application to the tens of thousands of employees throughout the State of Illinois. By applying the Seventh Circuit's standard to the hundreds and thousands of "high-level" positions the absurd possibilities are quite obvious and quite unacceptable. Applying this standard to the facts of the cases on appeal there is but one conclusion, the standard created and applied by the Seventh Circuit is far too broad to square with the precedents of the Court on this issue. The safe harbor created by the Seventh Circuit does not and will not sparingly grant a narrow exception, but imposes a broad and unreasonable expectation that most Illinois Department of Correction employees and, in fact, most State of Illinois employees, above those employees at the lowest level of government are subject to dismissal based on political affiliation.

C. Precedent does not support exclusive reliance on a job description document.

The Seventh Circuit erred when it relied solely on job description documents presented by the Respondents to determine that the Respondents had satisfied their burden to establish that political affiliation was an appropriate and reasonable requirement for the effective performance of the positions involved when the

Petitioners asserted their responsibilities were limited with well defined objectives and that they did not act as advisors or formulate plans for the implementation of broad goals. The Seventh Circuit relied upon decisions of the First, Second and Sixth Circuits to support its findings. However, the restriction of the patronage analysis solely to the job description is not uniformly accepted by the Circuits. Various Circuits have addressed the issue presented here, including the First Circuit, and the decisions of those Circuits conflict with the Seventh Circuit and utilize more than job descriptions to decide the issue. Baker v. Hadley, 167 F.3d 1014, 1018-19 (6th Cir. 1999)(Appropriate to consider duties as envisioned by incoming officeholder and actual duties of terminated employee.); Assaf, 178 F.3d 170; Akers, 998 F.2d at 225 (Review of bureaucratic hierarchy appropriate.); Zayas-Rodriguez, 830 F.2d at 3 (Review of organizational chart is appropriate to determine that position was among agency's top five.). Moreover, the First Circuit does not, in all cases, rely exclusively upon job description documents. Roldan-Plumey v. Cerezo-Suarez, 115 F.3d 58, 62 (1st Cir. 1997); Ortiz-Pinero v. Rivera-Arroyo, 84 F.3d 7, 13 (1st Cir. 1996); Feliciano v. Gaztambide, 836 F.2d 1, 3-4 (1st Cir. 1987). Additionally, despite prior decisions within the First Circuit finding a job description dispositive, when the job description at issue has not been signed by the employee, and when the employee has not even seen the job description and asserts that it does not accurately describe the position, the job description cannot be deemed admitted and the duties of the position must be considered disputed. Feliciano, 836 F.2d at 3-4 (Job description must be discounted and the court must rely on assertions of the plaintiff employee to resolve political affiliation issue.); See also Ortiz-Pinero, 84 F.3d at 13 (Written and signed job descriptions could provide probative evidence.). These points are particularly relevant in the cases at issue because First Circuit precedent does not support the unilateral reliance placed on the position descriptions by the Seventh Circuit because in each of the cases

the position descriptions were not signed by the Petitioners, the Petitioners had never seen the position descriptions and the Petitioners disputed that the position descriptions accurately described the positions. Finally, a prior decision of the Seventh Circuit also conflicts with the recent decisions. Thompson v. Illinois Department of Professional Regulation, 300 F.3d 750, 756-58 (7th Cir. 2002). In Thompson the Seventh Circuit considered an Illinois Department of Central Management Services position description the validity, truth and correctness of which was not challenged or disputed or added to by the employee, in fact, the position description was attached to the complaint and formed the basis of the claims asserted. Id. In Thompson the Seventh Circuit determined that lists of duties, terms of office, job titles, and supervisory authority are not dispositive. Id., citing Elrod, 427 U.S. at 367-68 and Milazzo v. O'Connell, 108 F.3d 129, 133 n. 1 (7th Cir. 1997). Under the circumstances presented in Thompson, three (3) judges of the Seventh Circuit (two (2) of which decided the instant cases, Judge Posner and Judge Bauer) found that an Illinois Department of Central Management Services position description was not entitled to great deference, but was simply some evidence to be scrutinized along with everything else that had been introduced. Id., at 756. The contrast between Thompson and the instant cases is stark. None of the Petitioners attached the Illinois Department of Central Management Services position description documents to the complaints of record and each Petitioner has challenged the validity, truth and correctness of the documents. The challenges made by each Petitioner were not simply challenges to the inferences to be drawn from the position description documents, or that each Petitioner performed less than was required of him by the positions descriptions as were made in Thompson, but that the position descriptions did not accurately describe the duties and responsibilities inherent in the positions at issue. In fact, the only undisputed issue, as contained in the

stipulation documents, is that the position description documents came from the files of the Illinois Department of Central Management Services. In the instant cases the Seventh Circuit has simply utilized the lists of duties, job titles, and supervisory authority to make a dispositive decision that conflicts with its decision in Thompson. See also Kiddy-Brown, 408 F.3d 346; Flenner v. Sheahan, 107 F.3d 459 (7th Cir. 1997) and Milazzo, 108 F.3d at 133 n. 1.

D. Prison employees have long been protected from patronage dismissals.

It has also been well established since at least 1988 that public employees involved in prison related duties were constitutionally protected from political patronage terminations. Hale, 219 F.3d 61 (Summary judgment is not appropriate regarding public speech objecting to superiors policies and practices, proper implementation of appropriate facility policies and concerning the proper administration of State facilities for the incarceration of juveniles, including internal facility administration relating directly to the plaintiff's duties and responsibilities by Director of youth correctional facility having policy-influencing position held at the pleasure of the Governor, even if the position is later determined to be a policymaker.); Sowards v. Loudon County, 203 F.3d 426, (6th Cir. 2000)(Political affiliation is not an appropriate requirement for jailer with decision-making authority with respect to providing for the needs and safety of the prisoners whose duties require discretion in the day-to-day operation of the jail, but who are supervised by and must follow the directives of superiors.); Diruzza v. County of Tehama, 206 F.3d 1304 (9th Cir. 2000)(Jail employee responsible for the custody, care, supervision, security, movement and transportation of inmates, as well as, drafting and revising policies and procedures in order to comply with court-ordered requirements protected from patronage termination.); Terry v. A.C. Cook, 866 F.2d

373, 377-78 (11th Cir. 1989)(After reviewing responsibilities of the position and relationship to elected official it was determined that loyalty to elected official is not a requirement for jailer position because such position traditionally revolve around limited objectives and defined duties and do not require those holding them to function as the alter ego of the elected official although each job implements policies the limited and defined roles of the position do not support the need for political loyalty to the elected official.); Dickeson, 844 F.2d at 1443 (After reviewing responsibilities of the position, including housing and feeding prisoners, supervising employees, preparing work schedules, ordering food and other nourishment related issues and relationship to elected official it was determined that loyalty to elected official is not a requirement for head jailer.). Therefore, no reasonable elected official could believe the terminations at issue in these cases were constitutionally acceptable and the decisions of the Seventh Circuit in the instant matters create a clear conflict among the Circuits regarding these types of employees.

III. Review is warranted to resolve conflicts regarding judgments based on issues, arguments or grounds for appeal presented for the first time on appeal.

The Seventh Circuit clearly erred when it entered judgment in favor of the defendants in each case based on issues, arguments or grounds for appeal presented for the first time on appeal without first allowing each plaintiff a reasonable opportunity to present all material pertinent to the issues. Under well established and long standing precedent of this Court appellate courts should not give consideration to issues not raised before the trial court unless there are special circumstances that warrant a departure from the general rule. Sims v. Apfel, 530 U.S. 103, 108-09 (2000); Singelton v. Wulff, 428 U.S. 106, 120 (1976); Fountain v. Filson, 336 U.S. 681, 683 (1949); Hormel

v. Helvering, 312 U.S. 552, 556 (1941). The reasoning for the rule is simple,

> "our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

Sims, 530 U.S. at 109; Hormel, 312 U.S. at 556. An appellate order of judgment cannot stand when it is based on a new issue which the opposite party had no opportunity to present a defense before the trial court or when the order is based on materials that are not a part of the record. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 156 (1963); Fountain, 336 U.S. at 683. For this Court to allow the decisions of the Seventh Circuit in Riley v. Blagojevich and Mark Pierson v. Blagojevich to stand would deprive the winning litigants in the District Court of the opportunity to remedy any identified defect which the appellate court discovered in those cases and deny the Petitioners their day in court as to disputed parts of the case on which the trial court has never ruled. Id. Had the Respondents made the assertions that the Seventh Circuit utilized and relied upon to enter judgment in favor of the Respondents in the District Court the Petitioners would have had an opportunity to present an appropriate defense. Moreover, there was certainly no occasion for any of the Petitioners to present evidence or argument to defend against the assertions that the Seventh Circuit utilized and relied upon to enter judgment in favor of the Respondents because it cannot be disputed that no such evidence or argument was presented to the District Courts. Therefore, it was erroneous for the Seventh Circuit to make its determinations utilizing and relying information not presented in the District Court without allowing

the Petitioners an opportunity to dispute the facts material to the assertions. Id.

The Seventh Circuit clearly takes into consideration citations to 20 ILCS 415/8a(1), 20 ILCS 415/10(4) and 80 Ill.Admin.Code 301.20, and "Duty Warden" responsibilities ("Duty Warden" responsibilities relate only to Riley v. Blagojevich and Snyder v. Blagojevich), as well as, the legal significance of the citations and the "Duty Warden" to the purported reliability of position description documents. Additionally, the Seventh Circuit engages in a general analysis of the Illinois civil service system, including purportedly conducting an inquiry into how a job description is "created", "updated and thus kept realistic rather than being allowed to drift far from the actual duties of the position", as well as, purporting to evaluate the system of "checks and balances designed to make the official job description accurate." Furthermore, the Seventh Circuit makes a determination that many policy judgments are made at the prison level because not all policy judgments can be made by the top officials of the Department of Corrections. However, a thorough search of the District Court records in each of the appeals will conclusively reveal that the Respondents did not present these issues in the District Courts. In fact, when this Court reviews the entire written record it will be revealed that the Respondents never even mentioned anything about the Illinois civil service system, including no evidence or references regarding how a job description is "created", "updated and thus kept realistic rather than being allowed to drift far from the actual duties of the position" or the system of "checks and balances designed to make the official job description accurate" and definitely no evidence or references related to 20 ILCS 415/10(4), 80 Ill.Admin.Code 301.20 or that any of the Petitioners could challenge and request changes to the position description documents. The Respondents also introduced no evidence and made no references to the "Duty Warden" responsibility or that policy judgments are made at the prison level because not all

policy judgments can be made by the top officials of the Department of Corrections. Moreover, the Respondents admitted that "statutory CMS authority may not have been described at length in the District Court." This Court and the Petitioners have no way of determining the weight given to the items not presented to the District Courts but by including references to these items in the Seventh Circuit opinions it is clear the items were relied upon when making the decisions. Without any citation to the records in the District Courts to support the material it is also quite clear that none of the Petitioners were given any opportunity, reasonable or otherwise, to present pertinent materials related to these listed matters. Therefore, consideration of and reliance on these items by the Seventh Circuit clearly conflicts with well settled precedent.

IV. Review is warranted to resolve a conflict regarding the propriety of judgments prior to trial under Federal Rules of Civil Procedure 12(c) and 56.

Motions for judgment on the pleadings are reviewed under the same standards as a motion to dismiss under Federal Rule of Civil Procedure 12(b). Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend, 163 F.3d 449, 452 (7th Cir. 1998). The central issue when reviewing a motion for judgment on the pleadings is whether considering the pleadings in the most liberal light favorable to the plaintiff, the complaint states a valid claim for relief or judgment on the pleadings is appropriate because there are no disputed issues of fact and only questions of law remain. Hughes v. Tobacco Institute, Inc., 278 F.3d 417, 420 (5th Cir. 2001); Northern, 163 F.3d at 452. When ruling on a motion for judgment on the pleadings the court is confined to the pleadings and must accept all allegations contained therein as true. Hughes, 278 F.3d at 420; Northern, 163 F.3d at 452; St. Paul Insurance Co. v. AFIA Worldwide Insurance Co., 937 F.2d 274, 279 (5th Cir. 1991).

When evidence outside of the pleadings is considered the court is required to treat the motion as one for summary judgment and comply with all the requirements of Rule 12(c). Romero v. International Terminal Operating Co., 358 U.S. 354, 358 n. 4 (1959). A motion for summary judgment should be granted so long as what is before the district court demonstrates that the standard for the entry of summary judgment as set forth in Rule 56(c) is satisfied. Lujan v. National Wildlife Federation, 497 U.S. 871, 885 (1990). Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In the view of the Court, the plain language of Rule 56(c) mandates the entry of summary judgment only after adequate time for discovery. Id.

A. There is a conflict among the Circuits regarding consideration of purportedly public records under Rules 12(c) and 56.

The Seventh Circuit erred when it considered and entered judgment under Rules12(c) and 56 in favor of the Respondents based on purportedly public records. The decision of the Seventh Circuit conflicts with a decision of the Third Circuit Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc., 998 F.2d 1192, 1197 (3rd Circuit 1993)(For the purposes of review on a motion addressing the pleadings a public record does not include documents that might be disclosed or accessible through a Freedom of Information Act because the public does not have unqualified access to such records.). The Seventh Circuit relied upon the purported public nature of the job description documents to determine that the documents are reliable ("The descriptions are 'public records and shall be open to public inspection.' 20 ILCS 415/14."). However, based on

the statutory citation it is not a reasonable inference to presume that the documents could be disclosed or that the documents are accessible to the public without a Freedom of Information Act request. Therefore, the public does not have unqualified access to such records.

B. There is a conflict within the Seventh Circuit regarding consideration of stipulations and affidavits under Rule 12(c) and 56 and providing a reasonable opportunity to present pertinent materials.

The Seventh Circuit erred when it considered and entered judgment under Rule 12(c) and 56 in favor of the Respondents based on matters outside of the pleadings, including stipulations and affidavits and citations to Illinois law without allowing Petitioners a reasonable opportunity to present pertinent information. As the title of Rule 12(c) implies a judgment on the pleadings is permitted based only on the pleadings alone and after conversion only after a reasonable opportunity to present pertinent information. The Seventh Circuit clearly relied upon on a variety of matters that were not presented or contained in the pleadings. The Seventh Circuit clearly took into consideration and relied upon materials, including stipulations and affidavits, as well, as, citations to 20 ILCS 415/8a(1), 20 ILCS 415/10(4) and 80 Ill.Admin.Code 301.20, and the legal significance of the citations to the purported reliability of position description documents, and "Duty Warden" responsibilities. This conflicts, and is inconsistent, with existing precedent, as well as, being incompatible with a review of a ruling based on Rule 12(c) and 56 standards. Northern Indiana Gun, 163 F.3d at 452; Dempsey v. Atchison, Topeka and Santa Fe Railway Co., 16 F.3d 832, 836 (7th Cir. 1994); Alexander v. City of Chicago, 994 F.2d 333, 336 (7th Cir. 1993); National Fidelity Life Insurance Co. v. Karaganis, 811 F.2d 357, 358 (7th Cir. 1987); Friedman v. Washburn Co., 145 F.2d 715, 719 (7th Cir. 1944).

The Seventh Circuit also failed to provide Petitioners with a reasonable opportunity to present pertinent material in opposition to all of the matters. Ribando v. United Airlines, Inc., 200 F.3d 507, 510 (7th Cir. 1999) citing Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 377 (7th Cir. 1987)(Failure to give adequate notice of conversion reversible error if there is a potentially disputed material issue of fact); R.J.R. Services v. Aetna Casualty and Surety Co., 895 F.2d 279, 281 (7th Cir. 1988)(Failure of the district court to make proper conversion and to provide litigants with appropriate notice to permit supplementation of the record can constitute reversible error.).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the questions presented by this Petition.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Case No. 04-3085, 04-3436

[Filed November 18, 2005]

SAMUEL RILEY,
Plaintiff-Appellee,

v.

ROD BLAGOJEVICH, Governor, individually and as Governor of the State of Illinois and ROGER E. WALKER, JR., individually and as Director of the Illinois Department of Corrections,
Defendants-Appellants

THOMAS SNYDER,
Plaintiff-Appellant,

v.

ROD BLAGOJEVICH, Governor, individually and as Governor of the State of Illinois and ROGER E. WALKER, JR., individually and as Director of the Illinois Department of Corrections,
Defendants-Appellees.

Before Hon. William J. Bauer, Circuit Judge, Hon. Richard A. Posner, Circuit Judge, Hon. Terence T. Evans, Circuit Judge.

ORDER

On October 7, 2005 plaintiffs filed a petition for rehearing and petition for rehearing *en banc* and on November 1, 2005, defendants filed an answer. All the judges on the original panel have voted to deny the petition, and none of the active judges* has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

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* Hon. Joel M. Flaum did not participate in the consideration of the petition.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case No. 04-3085, 04-3436

[Filed September 23, 2005]

SAMUEL RILEY,
Plaintiff-Appellee,

v.

ROD R. BLAGOJEVICH, Governor, individually and as Governor of the State of Illinois and ROGER E. WALKER, JR., individually and as Director of the Illinois Department of Corrections,
Defendants-Appellants

THOMAS SNYDER,
Plaintiff-Appellant,

v.

ROD R. BLAGOJEVICH, Governor, individually and as Governor of the State of Illinois and ROGER E. WALKER, JR., individually and as Director of the Illinois Department of Corrections,
Defendants-Appellees.

JUDGES: Before BAUER, POSNER, and EVANS, Circuit Judges.

OPINION

POSNER, *Circuit Judge*.

We have consolidated for argument and decision two essentially identical cases, though decided differently by the district judges. In both, assistant wardens of Illinois state prisons, fired by the governor of the state because they are not of his political party, contend that they are not policymaking officials or confidential employees and therefore that for the governor to have fired them on the basis of their political affiliation violated their right of free speech. They seek compensatory and punitive damages. In the case of Riley, who was assistant warden for operations at a prison that has some 700 inmates, Judge St. Eve denied the defendants' motion to dismiss, which asserted qualified immunity (and so the denial, though interlocutory, was an appealable order), and they appeal. In the case of Snyder, who before he was fired was the assistant warden for programs at a somewhat smaller prison, Judge Shadur granted summary judgment for the defendants, and Snyder appeals.

The Supreme Court has held in the name of freedom of speech that a public official cannot be fired on the basis of his political affiliation unless the nature of his job makes political loyalty a valid qualification; this could be either because the job involves the making of policy and thus the exercise of political judgment or the provision of political advice to the elected superior, or because it is a job (such as speechwriting) that gives the holder access to his political superiors' confidential, politically sensitive thoughts. *Elrod v. Burns*, 427 U.S. 347, 367-68, 96 S. Ct. 2673, 49 L. Ed. 2d 547

(1976); *Branti v. Finkel*, 445 U.S. 507, 518, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980). Identifying those jobs is no mean feat. Almost all jobs in government above the lowest levels require the holder of the job to exercise at least a modicum of discretion; and discretion exercised by a subordinate, invisible to the public, who is a political enemy of the elected officials who are blamed when things go wrong can undermine the officials' programs (often just by passive resistance) and by doing so thwart democratic preference.

Above the lowest levels of the civil service the question is not discretion or no discretion but less or more, and in such cases drawing a line is inescapably arbitrary, as the following summary of our previous cases suggests:

Political Affiliation Held to Be Permissible Qualification

Position	Case	Procedural Posture
General Inspector, City	Heck v. City of Freeport (7th Cir. 1993)	
Deputy Sheriff	Upton v. Thompson 930 F.2d 1209 (7th Cir. 1991); Dimming v. Wahl, (7th Cir. 1993)	SJ; (12)(c) respectively
Subdistrict Superintendent, State Dep't of Highways	Selch v. Letts, 5 F.3d 1040 (7th Cir. 1993)	Judgment as a Matter of Law ("JMOL")

Deputy County Auditor	Kline v. Hughes, 131 F.3d 708 (7th Cir. 1997)	SJ
State Deputy Attorney General	Americanos v. Carter, 74 F.3d 138 (7th Cir. 1996)	12(b)(6)

Position	Case	Procedural Posture
Interim Executive Director, County Housing Authority	Garcia v. Kankakee County Housing Authority 279 F.3d 535 (7th Cir. 2002)	SJ
Board of Zoning Appeals Member	Pleva v. Norquist, 195 F.3d 905 (7th Cir. 1999)	12(b)(6)
Regional Administrator and Asst. Regional Dep't of Children & Family Services	Ryan v. Ill. Dep't of Children & Family (7th Cir. 1999)	JMOL
Chief ALJ	Thompson v. Ill. Dep't of Professionalism (7th Cir. 2002)	12(b)(6)

Political Affiliation Not Held to Be Permissible Qualification

Position	Case	Procedural Posture
Prison Warden	Kiddy-Brown v. Blagojevich, 408 F.3d 346 (7th Cir. 2005) (ruling not on merits)	12(c)
Deputy Sheriff	Ruffino v. Sheahan, 218 F.3d 697, 700 (7th Cir. 2000) (dictum)	12(b)(6)
Human Resource Administrator	Milazzo v. O'Connell 151 F.3d 429 (7th Cir. 1994)	12(b)(6)
Chief Deputy, County Sheriff's Electrical Monitoring Unit	Kolman v. Sheahan, 31 F.3d 429 (7th Cir. 1994)	12(b)(6)
Paralegal (in state's)	Hernandez v. O'Malley, (7th Cir. 1996)	

Position	Case	Procedural Posture
Special Investigator (in state's attorney's office)	Carlson v. Gorecki, F.3d 461 (7th Cir. 2004)	SJ
County Correctional Officer	Flenner v. Sheahan 107 F.3d 459 (7th Cir. 1997)	12(c)
Dispatcher (in sheriff's)	Zorzi v. County of (7th Cir. 1994)	
City Court Coordinator	Mitchell v. Randolph, 215 F.3d 753 (7th Cir 2000)	SJ

In general, employees who have merely ministerial duties--who really have very little discretion--and employees whose discretion is channeled by professional rather than political norms (a surgeon often exercises judgment, but it is professional rather than political judgment), are not within the exception for policymakers. But the line between professional and policy judgment is often blurred; for example, is the physician who runs a county hospital making a professional judgment or a policy judgment if he decides to authorize the hospital's physicians to assist suicides, prescribe "medical marijuana," or perform abortions? And an administrator will often exercise both professional and broader policy responsibilities; this further complicates classification.

The uncertainty in the case law demonstrated in our table (similar tables could be constructed for the other federal courts of appeals), although somewhat exaggerated because

the same title can denote quite different levels of responsibility--a deputy sheriff could be a policeman in one sheriff's department and the second in command in another--creates a dilemma for elected officials such as the Governor of Illinois. How is he to know, when he takes office, whom he can fire and replace with loyalists, and whom not? Must he go behind the job descriptions and conduct an investigation into the actual duties performed by all the state employees who might be deemed policymaking or confidential employees, under pain of having to pay damages if a jury disagrees with the results of his inquiry? To what extent can he rely on the doctrine of qualified immunity to shield him from the consequences of such a disagreement? "Public officials need not predict, at their financial peril, how constitutional uncertainties will be resolved." *Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005) (en banc).

It seems to us that if no basis is presented for thinking the official job descriptions systemically unreliable in a sense to be explained, the elected officials can rely on them, even if a plaintiff is prepared to testify (self-servingly) that the job description doesn't actually describe what he does, thus precipitating a factual inquiry likely to be protracted and inconclusive. "Our focus is on the 'inherent powers' of the office, not what any individual officeholder actually does." *Meeks v. Grimes*, 779 F.2d 417, 419 n. 1 (7th Cir. 1985); see also *Americanos v. Carter*, 74 F.3d 138, 141 (7th Cir. 1996); *Tomczak v. City of Chicago*, 765 F.2d 633, 640-41 (7th Cir. 1985); *Roldan-Plumey v. Cerezo-Suarez*, 115 F.3d 58, 62 (1st Cir. 1997). (We take "inherent" to mean simply within the scope of the description.) "Such inquiry [into whether the job is one for which political affiliation is a permissible criterion because it involves either policymaking or confidentiality] presents a question of law informed solely by the job description and the powers of office." *Danahy v. Buscaglia*,

134 F.3d 1185, 1191 (2d Cir. 1998). "The idea that job performance (rather than job description) should control *Elrod-Branti* analysis has been consistently rejected by this court and others." *Gordon v. County of Rockland*, 110 F.3d 886, 888 (2d Cir. 1997), citing (besides our decision in *Meeks*) *Regan v. Boogertman*, 984 F.2d 577, 580 (2d Cir. 1993), and *Williams v. City of River Rouge*, 909 F.2d 151, 154 (6th Cir. 1990). Otherwise the courts--and the elected officials--would have "the burden of having to re-examine a certain position every time a new administration changes the mix of responsibilities bestowed upon the officeholder." *Tomczak v. City of Chicago*, *supra*, 765 F.2d at 641; see also *De Abadia v. Izquierdo Mora*, 792 F.2d 1187, 1192-93 (1st Cir. 1986).

These cases also refer to the importance of providing guidance to litigants. Incoming political leaders should be enabled to discover without protracted inquiry which jobs they can fill. Furthermore, "a new administration should not be overly hamstrung in filling key positions with loyal employees simply because of the way the prior administration operated." *Hadfield v. McDonough*, 407 F.3d 11, 18 (1st Cir. 2005). Nor would it be sensible to give employees who are assigned policy duties an incentive to try to protect their jobs simply by not performing those duties.

For the job description to be the pivot on which the case turns, inquiry must focus on how the description was created; how it is updated and thus kept realistic rather than being allowed to drift far from the actual duties of the position; and, in short, on how reliable, how authoritative, the description is. The descriptions of the assistant-warden positions in the Illinois state prison system score well on this test. Not that each is an exact description of what every assistant warden for operations or for programs does, for there are dozens of

assistant wardens distributed across the state's prisons and their activities must differ in accordance with the conditions of their prison, the leadership style of the warden, and their own ideas and initiative. But each of the two descriptions is a *reliable* description rather than something that has been manipulated by officials seeking to expand their power to appoint loyalists beyond the lawful bounds.

The description of Snyder's job (assistant warden for programs) has not been changed materially since 1989, which is long before Blagojevich became governor, and while only the current description of Riley's job is in the record, we are given no reason to think that it has changed over the years either. Job descriptions are made and updated by the state's Department for Central Management Services and reviewed by the Civil Service Commission, 20 ILCS 415/8a(1), 415/10(4); 80 Ill. Admin. Code § 301.20, and though those two agencies are part of the executive branch we are again given no suggestion that Blagojevich or any other political official has been tinkering with the assistant-warden job descriptions. The descriptions are "public records and shall be open to public inspection." 20 ILCS 415/14. Any job holder who thinks the official description of his job inaccurate can challenge it and, if he succeeds in showing that it is inaccurate, get it changed. 20 ILCS 415/8a(1); 80 Ill. Admin. Code § 301.20. It might seem that only a job holder who thought that the description understated his duties would seek a change, in order to buck for a raise. That is not correct. A job holder does not want his job description to list duties that he does not perform, because the discrepancy will make it easy for his superiors to fire him for inadequate performance.

With these checks and balances designed to make the official job description accurate, the state is entitled to rely on it to reveal the scope of the job holder's duties and enable the

court to determine whether the duties bring the job into the circle within which elected officials are entitled to demand political loyalty. So let us turn to the descriptions. The description of the job of assistant warden for operations (Riley's job) is as follows:

> Subject to administrative approval of the Warden, . . . serves as Assistant Warden of Operations: formulates, organizes, and directs the overall Operations Program for Tamms Correctional Center; supervises staff; maintains and enforces disciplinary, safety, security and custodial measures; administratively responsible and accountable for execution of policies and procedures in management of the institution while serving as Duty Warden.
>
> 1. As Assistant Warden, assists in the development, establishment and implementation of rules, regulations, directives, policies and procedures of the institution to ensure proper operation of the daily functions; administratively responsible and accountable for execution of policies and procedures in management of the institution while serving as Duty Warden. (35%)
>
> 2. Plans, organizes and directs the overall Operations function and their managers, including security, physical plant operations, dietary services, inmate discipline, work camp and other miscellaneous logistical support services; coordinates all inmate programs related to these functions; participates in the budget process by gathering data from department heads regarding current and anticipated programs and projects; makes recommendations to management outlining budgetary needs. (25%)

3. Supervises staff; assigns work; approves time off; provides guidance and training; gives oral reprimands and effectively recommends grievance resolutions; completes and signs performance evaluations; establishes annual goals and objectives; counsels employees on problems with productivity and quality of work; determines staffing needs to achieve program goals and objectives; reviews activity reports. (15%)

4. Serves as Chairman of the Safety and Sanitation Committee; conducts routine and unscheduled safety, health, sanitation and security inspection tours throughout the institution; makes recommendations to the Warden as to any changes, problems or improvements. (10%).

5. Serves as Chairman of the Adjustment Committee; makes decisions on disciplinary problems involving infractions of the institution rules by residents; hears and resolves problems; enforces discipline. (10%).

6. Performs other duties as required or assigned which are reasonably within the scope of the duties enumerated above. (5%).

And here is the description of the job of assistant warden for programs (Snyder's job):

Under administrative direction of the Warden . . . of Taylorville Correctional Center, plans, organizes and directs the entire Program Services for the rehabilitation and resocialization of residents at the Taylorville Correctional Center; formulates operation procedures and rehabilitation programs for areas of assignments; interprets and carries out policies of the

Department of Corrections and institutional superintendent; is administratively responsible and accountable for execution of policies and procedures and management of the institution while serving as Duty Warden.

1. Plans, organizes and assumes direct responsibility over functions of academic and vocational, chaplaincy, clinical services, leisure time activities, medical and dental services; coordinates all residents programs relating to these functions. Monitors Pre-Start Program and Lifestyle Redirection Program. (30%)

2. Assists the Warden in carrying out policies, rules and regulations of the institution ensuring orderly operation of daily functions of the institution, administratively responsible and accountable for execution of policies and procedures and management of the institution while serving as Duty Warden. (25%)

3. [Identical to paragraph 3 of job description of assistant warden for operations]. (20%)

4. Speaks to lay and professional groups regarding various institutional programs; answers correspondence from the general public. (10%).

5. Conducts daily routine inspection tours of the institution including the inspection of resident's living quarters; instructs and counsels residents by holding regular interviews by request in order to assist them with problems and confers with resident's relatives. (10%).

6. [Identical to paragraph 6 of job description of assistant warden for operations].

Note to begin with the references to "Duty Warden." The two assistant wardens are the top officials in an Illinois prison below the warden himself; there is no deputy warden. That means that when the warden is sick, on vacation, or simply off duty, one of the assistant wardens is in charge, i.e., is the "Duty Warden." Since a prison is a 24-hour-a-day, seven-day-a-week operation, the assistant wardens must be in charge much of the time, since the warden can't work anywhere near a 168-hour week.

Of course the duty warden will avoid making major, irrevocable policy decisions, but he will necessarily be exercising quite broad discretionary authority when he is standing in for the warden. Even when the warden is on duty the assistant warden is required to perform a variety of important discretionary functions that are particularly sensitive in a prison setting. Granted, paragraphs 3, 4, and 6 of the operations assistant's description, and paragraphs 3 through 6 of the programs assistant's description, could well be thought merely professional or ministerial, rather than judgmental, policy-oriented, and politically sensitive. But the remaining portions of both descriptions enumerate a variety of tasks that are judgmental, policy-oriented, and politically sensitive.

The operation of the state's prisons costs more than a billion dollars a year and is one of the major functions of Illinois state government, and, as the descriptions make clear, not all the policy judgments required for their operation can be made by the top officials in the Department of Corrections. Many of those judgments have to be made at the prison level, in recognition of differences in the size and composition of the

prison population, in the location of prisons, and in the design and quality of physical plant. The state could if it wanted deprive its wardens and assistant wardens of all policy functions and run the state prison system as if it were a single prison (with more than 40,000 inmates!) with the state's Director of Corrections as the warden and two deputies of his as the assistant wardens. But it is apparent from the job descriptions that the state has not done that.

The plaintiffs rely heavily on *Kiddy-Brown v. Blagojevich*, 408 F.3d 346 (7th Cir. 2005). Among a number of issues in that case was whether the job description of warden of an Illinois state prison entitled the governor to treat the warden's job as a policymaking position. The court rejected the contention and remanded the case for further factual development. The result may seem flatly inconsistent with our analysis, especially since our plaintiffs are only assistant wardens. But the appearance is deceptive. There is no inconsistency, and we have neither cause nor inclination to intimate any criticism of the decision, which turned on a procedural point inapplicable to the present case. The only evidence in *Kiddy-Brown* was the plaintiff's affidavit in which she stated--implausibly, but that is neither here nor there--that she "had no autonomous or discretionary authority." *Id.* at 355. Since there was no other evidence, the court ruled that the defendants were not entitled to judgment so early in the litigation. They had, it is true, appended to their answer to the complaint the official description of the warden's job, which indicated that a warden indeed possesses discretionary authority. But the court did not treat the description as evidence; for no testimony, affidavit, statutory reference, stipulation, or other ground for believing that the description *was* official, reliable, and up to date had been presented. So far as appeared, the description appended to the answer had been drafted by Governor Blagojevich in person the day-

before the answer was filed. Not that that was likely; but it was not a possibility excluded by the evidence.

The contrast with our cases is stark. Riley stipulated that the description of the job of assistant warden for operations that we have quoted is indeed the official description of his job. Snyder did not so stipulate, but in an affidavit acknowledged that the job description had come from the Department of Central Management Services. In their briefs in this court, Riley, notwithstanding his stipulation, and Snyder, in identical language (they have the same lawyer), complain that "the document [the job description] contains no reference to any Illinois statute." But a public document doesn't have to contain a statutory reference in order to be official. Indeed, the reference itself could not attest to the authenticity or reliability of the document but merely assist the reader in tracing its provenance. Nor did Riley purport to be withdrawing his stipulation.

We know from the numerous cases cited earlier that the job description, if reliable, is the correct basis for the court's determining whether political affiliation is a legitimate requirement of the job. But because this principle was not pressed on, or mentioned by, the court in *Kiddy-Brown*, the court treated the job description appended to the defendants' answer as a document barren of evidentiary significance, since no effort had been made to establish its authenticity, let alone its reliability. The court decided *Kiddy-Brown* as the case had been framed by the parties. The present case was properly framed in accordance with the unchallenged case law cited earlier.

Neither those cases nor our decision today stand for the proposition that every *Elrod/Branti* case can be resolved just by reading the job description. The description might leave

the reader unclear whether the job confers any policy-making or confidential discretion, and then additional evidence would be necessary. Some job descriptions, perhaps, will have been altered by the elected officials not to reflect actual changes in the duties of a position but rather to enable them to fill jobs that do not involve such duties with their political favorites. Neither is a factor in the present case. The descriptions ascribe significant policymaking responsibilities to assistant wardens of Illinois state prisons and we know from the cases that the fact that particular incumbents may have been mice who forbore to exercise any of those duties is irrelevant. There is no indication that the job descriptions in the record are not official (all the indications are to the contrary) or that Governor Blagojevich or any other political official caused them to be altered, as by leaning on the members of the Civil Service Commission.

We also do not mean to suggest that official job descriptions are straitjackets that prevent elected officials from altering the duties of their subordinates. State law may or may not allow such an official to impose on a subordinate duties not listed in the official job description. But as a matter of federal constitutional law, if a public employee in fact exercises policymaking or confidential duties he can be fired on the basis of his political affiliation; he may have remedies under state law but his federal constitutional rights will not have been violated.

The significance of the official job description in a case like this is thus as a provisional safe harbor for elected officials. If the official job description is objective, as shown by the methods by which it is created, vetted, and updated to the present, then the elected officials can rely on it in deciding whom they can replace on political grounds.

Riley and Snyder also claimed that their dismissal was wrongful retaliation for their exercise of free speech and a deprivation of property without due process of law. But the first claim is merely a restatement of their claim that political affiliation is a forbidden criterion for an assistant warden's job, and a due process claim identical to theirs was correctly rejected in *Kiddy-Brown*.

We therefore reverse No. 04-3085 and affirm No. 04-3436.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No. 04 C 1296

[Filed July 30, 2004]

SAMUEL RILEY, Plaintiff,	)
v.	)
ROD R. BLAGOJEVICH and ROGER WALKER, JR., Defendants.	)

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

After the termination of his employment as Assistant Warden at Tamms Correctional Center, Plaintiff sued Defendants, alleging that Defendants violated his First Amendment rights by removing him because of political affiliation and in retaliation for his criticism of Defendants' administration. Plaintiff also alleges that Defendants violated his due process rights by terminating his employment. Defendants moved for judgment on the pleadings pursuant to

Rule 12(c). Plaintiff responded, in part, by moving to strike portions of Defendants' answer. As discussed below, Defendants' motion for judgment on the pleadings is granted in part. Plaintiff's motion to strike is granted in part.

FACTUAL BACKGROUND

This case is one of ten lawsuits brought by the same counsel on behalf of former Illinois Department of Corrections ("IDOC") officials alleging that they were unlawfully terminated by Defendants.[1] Plaintiff worked for the IDOC for 23 years, most recently as Assistant Warden of Tamms Correctional Center. Riley's superiors defined the following duties and responsibilities in his position as Assistant Warden: (1) assisting the Warden in daily functions, including security, physical plant operations, dietary services, and inmate discipline; (2) monitoring programs for inmates; (3) supervising, guiding, and training staff; and (4) conducting routine inspection tours. (R. 3-1, First Am. Compl. P9.)

In addition to these four aspects of Plaintiff's employment, Plaintiff's complaint alleges that he had neither close contact nor highly confidential communications with IDOC policymakers; no autonomous or discretionary authority; no hiring or firing authority; and no budgetary authority. (*Id.* at PP20-24.) Further, Plaintiff alleges that he "did not

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[1] The other nine cases are *Bigley v. Blagojevich*, No. 04 C. 937; *Pierson v. Blagojevich*, No. 04 C 939, *Clark v. Blagojevich*, No. 04 C 941; *Snyder v. Blagojevich*, No. 04 C 1291; *Kiddy-Brown v. Blagojevich*, No. 04 C 1293; *Pierson v. Blagojevich*, No. 04 C 1296; *Foster v. Blagojevich*, No. 04 C 2069; *Buchheit v. Blagojevich*, No. 04 C 2070; and *Trancoso v. Blagojevich*, No. 04 C 2071.

participate in determining policy which fixed objectives, or stated principles to control action toward operating objectives, or toward the conduct of IDOC, and IDOC district, Tamms Correctional Center" or other units under Defendants. (*Id.* at P25.) Plaintiff alleges that his actions were subject to approval by Defendants and several levels of management. He contends that he did not act authoritatively on any policymaking issue and that he had no meaningful input into governmental decision making. Plaintiff Riley alleges that he did not advise Defendants or formulate plans to implement broad goals and that he did not have broad discretionary policymaking powers. According to Plaintiff, he was constrained by regulations and rules in his employment. (*Id.* at PP26-31.)

As an exhibit to its answer, Defendant provided a document on the letterhead of the Illinois Department of Central Management Services entitled "Position Description." This document purports to offer a "complete, current and accurate statement of position essential functions" for the position of Assistant Warden. R. 15-1, Answer, Ex. A.) The Position Description describes the duties listed in the Amended Complaint and a few more, including assisting "in the development, establishment and implementation of rules, regulations, directives, policies and procedures of the institution to ensure proper operation of the daily functions;" being "administratively responsible and accountable for execution of policies and procedures in management of the institution;" and planning, organizing, and directing "the overall Operations functions and their managers . . . ." (*Id.*)

Plaintiff contends that Defendants terminated him because he was not a member of the Democratic Party. Additionally, Plaintiff contends that Defendants terminated his employment because he had spoken out on matters of public concern, such as the qualifications of prospective IDOC personnel, third-

party interference in IDOC hiring decisions, staffing levels, facility safety, and IDOC reorganization. Finally, Plaintiff contends that Defendants' actions deprived him of his Constitutional right of due process.

LEGAL STANDARDS

Rule 12(c) allows a party to move for judgment on the pleadings. A Rule 12(c) motion differs from the various Rule 12(b) motions in that 12(b) motions are brought before the pleadings are closed, and 12(c) motions are brought after. Despite the difference in timing, Rule 12(c) motions are reviewed under the same standards that apply to motions under Rule 12(b). Accordingly, courts should only grant a motion for judgment on the pleadings if "it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend,* 163 F.3d 449, 452 (7th Cir. 1998) (citing *Craigs, Inc. v General Elec. Capital Corp.*, 12 F.3d 686, 688 (7th Cir. 1993)) (internal quotation omitted). In reviewing the complaint, the court views all facts alleged therein in the light most favorable to the plaintiff. *See GATX Leasing v. Nat'l Union Fire Inc. Co.*, 64 F.3d 1112, 1114 (7th Cir. 1995).

ANALYSIS

I. Plaintiff's Motion to Strike

Plaintiff moves to strike certain portions of Defendants' Answer to the First Amended Complaint ("Answer") for failure to comply with Rule 8(b) of the Federal Rules of Civil

Procedure.[2] Specifically, Plaintiff argues that Defendants' answers to Paragraphs 9, 20-31, and 77 of Plaintiff's complaint violate the requirements of Rule 8(b). Additionally, Plaintiff argues that the Court should strike Exhibit A of the Answer -- a description of the duties of Assistant Warden -- under Rule 8(b).

Plaintiff builds his argument on the text of Rule 8 and Judge Shadur's pronouncement that the rule "is quite specific in defining the only circumstances under which a pleader can do something other than either admit or deny an allegation . . . ." *Gilbert v. Johnston*, 127 F.R.D. 145, 146 (N.D. Ill. 1989). While the *Gilbert* opinion emerged from judicial exasperation over defendants' chronic misunderstanding of Rule 8, Defendants' answer does not commit the offense that Judge Shadur recognized. The *Gilbert* opinion deals with answers that gloss over the subtleties of belief, knowledge,

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[2] Rule 8(b) states: "A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11."

information, and strict proof as those topics bear on answers that neither admit nor deny allegations. Indeed, insofar as Defendants provide such an answer (to Paragraph 77), they conform to the *Gilbert* standard.

The text of Rule 8(b) specifically allows a party to "state in short and plain terms the party's defenses to each claim asserted." Despite Plaintiff's attempt to establish a definitive line between claims and averments, the Court declines to strike the cited portions of Defendants' answer, including Exhibit A of the Answer. Plaintiff's argument in favor of striking the exhibit consists mainly of pointing out that Defendants have provided no case law supporting their right to attach documents to the Answer. Nevertheless, the Seventh Circuit clearly contemplates the attachment of documents to answers. *See Northern Ind. Gun & Outdoor Shows, Inc.*, 163 F.3d at 452. Plaintiff's motion to strike is therefore denied with respect to Paragraphs 9, 20-31, and 77, and Exhibit A of Defendants' Answer.

Plaintiff also objects to the fact that Defendants have included the following as an affirmative defense: "The Amended Complaint fails to state a claim for which relief can be granted," pointing out that the statement attacks Plaintiff's *prima facie* case and does not raise an affirmative defense. While Defendant points to other courts in the Northern District that have allowed such statements to stand as affirmative defenses, the Court agrees with Judge Bucklo that "this type of allegation is not an affirmative defense which adds substance to the litigation; it is clutter." *Surface Shields, Inc. v. Poly-Tak Protection Systems, Inc.*, 213 F.R.D. 307, 308 (N.D. Ill. 2003) (citing *Imperial Constr. Mgmt. Corp. v. Laborers' Int'l Union*, 818 F. Supp. 1179 (N.D. Ill. 1993)). Accordingly, Plaintiff's motion to strike is granted with respect to Defendants' first affirmative defense.

II. Motion for Judgment on the Pleadings

Defendants have moved for judgment on the pleadings with respect to each of Plaintiff's claims. As a threshold matter, the Court must address the question of what materials it may consider on such a motion. While Plaintiff's motion to strike Exhibit A was unsuccessful, the question remains whether or not the Position Description attached to the Answer is properly considered on a motion for judgment on the pleadings.

"Rule 12(c) permits judgment based on the pleadings alone," which include "the complaint, the answer, and any written instruments attached as exhibits." *Northern Ind. Gun & Outdoor Shows, Inc.*, 163 F.3d at 452. The Seventh Circuit has held that documents such as letters and affidavits satisfy the "written instrument" requirement. *Id.* at 453. Accordingly, the Court may consider the Amended Complaint, Defendants' Answer, and Exhibit A in resolving this motion. All materials must be viewed in the light most favorable to the Plaintiff. *See GATX Leasing*, 64 F.3d at 1114.

A. Count I

Defendants move for judgment with respect to Count I on the grounds that political affiliation is an appropriate requirement for the position of Assistant Warden. "Party affiliation may be an acceptable requirement for some types of government employment. . . . If an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." *Branti v. Finkel*, 445 U.S. 507, 517, 100 S. Ct. 1287, 1294, 63 L. Ed. 2d 574 (1980). The

Seventh Circuit has articulated the relevant inquiry for this determination in the following terms: "The test is whether the position held by the individual authorizes, either directly or indirectly, meaningful input into governmental decision-making on issues where there is room for principled disagreement on goals or their implementation." *Americanos v. Carter,* 74 F.3d 138, 141 (7th Cir. 1996) (citing *Heideman v. Wirsing,* 7 F.3d 659, 662-63 (7th Cir. 1993). Further, a court must examine "the powers inherent in a given office, rather than the actual functions [that] the occupant of that office performed." *Id.* (citing *Heck v. City of Freeport,* 985 F.2d 305, 309 (7th Cir. 1993)). The Court notes, however, that "it is impossible to generalize about the nature of an individual type of position," and that "job responsibilities and duties can vary greatly between different governmental units or even within a governmental unit." *Meeks v. Grimes,* 779 F.2d 417, 421 (7th Cir. 1985).

Plaintiff alleged that he had no policymaking authority as Assistant Warden, and thus argues that political affiliation is an inappropriate requirement for that position. Defendants point to the list of duties in the Position Description to show that policymaking was inherent in the position of Assistant Warden. Unfortunately for Defendants, the Position Description is not fit for this task. Viewed in the light most favorable to Plaintiff, the document does not ensure that Plaintiff "cannot prove any facts that would support his claim for relief," such as evidence that other Assistant Wardens possessed only the limited powers enumerated in Plaintiff's complaint. *Northern Ind. Gun & Outdoor Shows, Inc.,* 163 F.3d at 452. Accordingly, Defendants' motion for judgment on the pleadings is denied with respect to Count I.

This result comports with Judge Coar's recent opinion in *Kiddy-Brown v. Blagojevich,* in which the court rejected the

same argument by Defendants. 2004 U.S. Dist. LEXIS 11078, No. 04 C 1293, 2004 WL 1375321, *3 (N.D. Ill. June 17, 2004) ("The Court cannot conclude, as a matter of law, that political affiliation is an appropriate requirement for the Warden position."). Responding to Judge Coar's ruling in a supplemental brief before this Court, Defendants argue that the ruling ignored Seventh Circuit precedent in which "as here -- the duties of the position were 'easily ascertainable.'" ®. 38-1, Defs.' Supp. Br., p. 3.) Therein lies the weakness of Defendants' argument. Defendants overestimate the clarity with which the Position Statement sets forth the duties of Assistant Warden. The Position Description does not foreclose the possibility that the inherent duties of the Assistant Warden position do not include policymaking. Plaintiff could conceivably present evidence that the inherent duties of an Assistant Warden did not include any involvement in government decision making. At this stage of the litigation, the Court cannot conclude as a matter of law that party affiliation is an appropriate requirement for the position of Assistant Warden.

B. Count II

Plaintiff contends that Defendants terminated his employment because he spoke out on matters of public concern. The free speech rights of a government employee are subject to competing interests which must be weighed in considering a First Amendment claim: (1) the employee's right of expression as an individual; and (2) the government's interest in conducting its affairs effectively. *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734, 20 L. Ed. 2d 811 (1968). The Seventh Circuit, however, has held that the balancing test does not apply to speech by a government employee in a policymaking position. *Vargas-Harrison v. Racine Unified School Dist.*, 272 F.3d

964, 970-71 (7th Cir. 2001). Further, a policymaking employee can be discharged when that employee "has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies." *Id.* at 971.

Defendants argue that because (1) Plaintiff occupied a policymaking position and (2) Plaintiff affirmatively alleges that he engaged in public speech that was critical of IDOC policies, then under *Vargas-Harrison,* Defendants were justified in ending Plaintiff's employment. As discussed above, however, Defendants have not shown as a matter of law that Plaintiff occupied a policymaking position. Accordingly, Defendants' motion for judgment on the pleadings is denied with respect to Count II.

C. Qualified Immunity

"Qualified immunity shields from liability government officials who are performing discretionary functions in the course of duty to the extent that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Spiegel v. Cortese,* 196 F.3d 717, 723 (7th Cir. 1999) (internal quotation omitted). "The cloak of qualified immunity is removed from a government official if the plaintiffs show that the law prohibiting the government official's conduct was 'clearly established.'" *Carlson v. Gorecki,* 374 F.3d 461, 2004 U.S. App. LEXIS 13325, 2004 WL 1445440, *4 (7th Cir. June 29, 2004) (citing *Gregorich v. Lund,* 54 F.3d 410, 413 (7th Cir. 1995)). Therefore, to determine qualified immunity, the Court must consider "(1) whether the plaintiff has asserted a violation of a federal constitutional right, and (2) whether constitutional standards implicated were clearly established at the time in question." *Spiegel,* 196 F.3d at 723.

In the *Kiddy-Brown* opinion, Judge Coar cited *Flenner v. Sheahan,* 107 F.3d 459, 463 (7th Cir. 1997) for the proposition that no qualified immunity attaches in cases such as Plaintiff's. Pointing to existing case law, the Seventh Circuit said, "these cases made clear that an employee who performs primarily ministerial functions and who has little autonomy or discretion in performing his duties is not subject to patronage dismissal. *Flenner,* 107 F.3d at 463. Viewing the facts in the light most favorable to Plaintiff, he was an employee who performed primarily ministerial functions and who has little autonomy or discretion. Defendants are not entitled, therefore, to judgment on the pleadings with respect to qualified immunity.

D. Count III

Plaintiff's Count III alleges that Defendants violated his due process rights by terminating his employment as Assistant Warden. Defendants advance several arguments in moving for judgment on the pleadings, including the assertion that Defendant Blagojevich's alleged statements give Plaintiff no entitlement to continued employment.

To prevail on a due process claim, a plaintiff must show: (1) a constitutionally protected property interest; (2) a deprivation of that interest; and (3) insufficient process in connection with the deprivation. *Polenz v. Parrott,* 883 F.2d 551, 555 (7th Cir. 1989). "In the employment context . . . a property interest can be created in one of two ways: (1) by an independent source such as state law securing certain benefits; or (2) by a clearly implied promise of continued employment." *Shlay v. Montgomery,* 802 F.2d 918, 921 (7th Cir. 1986) (citing *Munson v. Friske,* 754 F.2d 683, 692 (7th Cir. 1985)) (quotations omitted). Plaintiff attempts to satisfy the property interest requirement through Paragraphs 70-71 of

the Amended Complaint. In those paragraphs, Plaintiffs allege that Defendants were authorized to make IDOC employment decisions pursuant to certain statutes and an executive order, and that Defendant Blagojevich made a promise of continued employment to employees of the State of Illinois.

As Judge Shadur warned in his March 9, 2004 opinion in *Snyder v. Blagojevich,* however, Blagojevich did not have the authority to make such a promise to IDOC employees such as Plaintiff. Addressing the issue of promises of continued employment made by government officials, the Seventh Circuit stated, "Even if we accept as true [plaintiff's] contention that the corporation counsel gave him a career contract, it is of no legal consequence. [Plaintiff] cites to no source, and we can find none, which purports to give the corporation counsel the authority to create a career position for a person in [Plaintiff's] situation. Any promise for such a position would, therefore, be unenforceable since it is well-established that a city is generally not legally responsible for acts taken by its officers in excess of their authority. *Shlay v. Montgomery,* 802 F.2d 918, 921 (7th Cir. 1986).

Attempting to establish a basis for such authority, Plaintiff alleges that "Defendants . . . are authorized to make IDOC employment decisions pursuant to 730 ILCS 5/3-2-2, 20 ILCS 5/5-15, 20 ILCS 5/5-20 and 20 ILCS 5/5-645." R. 3-1, First Am. Compl. P70.) With respect to these statutory sections, the Court agrees with Judge Shadur's assessment:

> 1. All that the first-cited statute provides is that IDOC is administered by the Director of Corrections (Walker), who is appointed by the Governor.

2. All that the second cited statute does is to create various departments of state government, including IDOC.

3. As for the third-cited section, it specifies that each department has a Director at its head and that the Director (not the Governor), subject to the provisions of the Civil Administrative Code, executes the powers and discharges the duties established by law.

4. Finally, the last cited statute does nothing more than to provide that each department may obtain "necessary employees."

Snyder v. Blagojevich, No. 04 C 1291, March 9, 2004 Order at 2. None of these statutes gives Blagojevich the authority to personally make employment decisions with respect to IDOC employees.

Plaintiff also points to Executive Order Number 1, claiming that this document "mandates that all employment decisions regarding state employment, including IDOC, are to be made by Defendant Blagojevich."[3] As Defendants point

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[3] The text of Executive Order Number 1 is as follows: "I, Rod R. Blagojevich, Governor of Illinois, order that no agency, department, bureau, board or commission subject to the control or direction of the Governor shall hire any employee or officer, fill any vacancy, create any new position, promote any employee or officer to any position or take any other action which will result in the increase or the maintenance of present levels in State employment or compensation (including benefits) payable in connection with State employment, including personal service contracts. All hiring and promotion are frozen. There will be no exceptions to this Executive Order without the express written

out, however, this Order refers to a hiring freeze, not a grant (or seizure) of hiring authority with respect to IDOC employees. Additionally, Plaintiff's invocation of Executive Order Number 1 proves too much -- as Judge Shadur explained in connection with Snyder's resort to Article 5, Section 8 of the Illinois Constitution. "If that were to be read as [Plaintiff's] counsel could have it, the Governor would be responsible -- and personally liable(!) -- for every hiring and firing decision involving any of Illinois' thousands of state employees." *Id.* at 3.

Because he was not authorized to make hiring and firing decisions for the IDOC, any promise of continued employment made by Defendant Blagojevich was made in excess of his authority. Accordingly, Plaintiff may not rely on such a promise to form the basis of his due process claim. Because Plaintiff alleges no other basis for this claim in his Amended Complaint, Plaintiff's due process claim fails. Defendants' motion for judgment on the pleadings is granted with respect to Count III.

CONCLUSION

Defendants' motion for judgment on the pleadings is denied with respect to Counts I and II, and granted with respect to Count III. Plaintiff's motion to strike portions of Defendants' answer is granted with respect to Defendants' first affirmative defense.

AMY J. ST. EVE
United States District Court Judge

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permission of my office after submission of appropriate requests to my office." Exec. Order No. 1, Jan. 14, 2003.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case No. 04 C 1291

[Filed July 29, 2004]

SAMUEL RILEY,
Plaintiff,

v.

ROD BLAGOJEVICH, and ROGER E. WALKER, JR.,
Defendants.

MINUTE ORDER

Michael W. Dobbins
CLERK

Scott Anthony Schimanski
Law Office of Scott A. Schimanski
360 West Jefferson *Stree*
Jcliet, IL 60435

ASSIGNED JUDGE: Honorable Amy J. St. Eve

MINUTE ORDER of 7/29/04 by Hon. Amy J. St. Eve: Defendants' motion for judgment on the pleadings is denied [19-1] with respect to Counts I and II, and granted with respect to Count III. Plaintiff's motion to strike is granted [26-1] with respect to defendants' first affirmative defense. (Entered Memorandum Opinion and Order.) Mailed notice.

This docket entry was made by the Clerk on July 30, 2004.

ATTENTION:

This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case No. 04 C 1296

[Filed July 29, 2004]

SAMUEL RILEY,	)
Plaintiff,	)
	)
v.	)
	)
ROD BLAGOJEVICH, and ROGER E. WALKER, JR.,	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

Defendants' motion for judgment on the pleadings is denied with respect to Counts I and II, and granted with respect to Count III. Plaintiff's motion to strike is granted with respect to Defendants' First Affirmative Defense.

/s/ _____
Amy J. St. Eve
Judge

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No. 04 C 1291

[Filed August 23, 2004]

THOMAS SNYDER,	)
Plaintiff,	)
	)
v.	)
	)
ROD R. BLAGOJEVICH, et al.	)
Defendants.	)
	)

MEMORANDUM OPINION AND ORDER

BY: MILTON I. Shadur

Thomas Snyder ("Snyder") has alleged that Illinois Governor Rod Blagojevich ("Blagojevich") and the Director of the Illinois Department of Corrections ("DOC") Roger Walker, Jr. (collectively "State Officials") violated 42 U.S.C. § 1983 ("Section 1983") when they dismissed him from his job as Assistant Warden of Programs ("Assistant Warden") at the Taylorville Correctional Center. In response State Officials have filed a motion for judgment on the pleadings

pursuant to Fed. R. Civ. P. ("Rule") 12(c), attaching to their motion a position description promulgated by the Illinois Department of Central Management Services ("Position Description")(B-W Ex. B; see also Aff. of Maribeth Moore).[1]

This Court's June 4, 2004 memorandum order held that because the Position Description was a matter outside of the pleadings, State Officials' motion should be addressed as a Rule 56 (rather than a Rule 12(c)) motion. Snyder was therefore given an Opportunity to come forward with additional evidence. This Court's ensuing review of each side's memoranda and evidentiary submissions has confirmed that State Officials' motion, evaluated under Rule 56 standards, succeeds in its entirety.

Rule 56 Standards

All Rule 56 movants bear the burden of establishing the absence of any genuine issue of material fact (*Celotex Corp. v. Catrett*, (477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). For that purpose courts consider the evidentiary record in the light most favorable to nonmovants and draw all reasonable inferences in their favor *(Lesch v. Crown Cork & Seal Co.*, 282 F.3d 467, 471 (7th Cir. 2002)). Ultimately summary judgment is warranted only if all the pleadings and supporting documents indicate that *a* reasonable jury could not return a verdict for a nonmovant (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Heck v. City of Freeport*, 985 F.2d 305, 307 (7th Cir. 1993)).

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[1] Other than Snyder's original pleading, citations to materials submitted by Snyder are identified "S." Citations to materials submitted by State Officials are designated by their individual initials: "B-W."

Because Snyder's motion was originally presented as a Rule 12(c) motion and acquired its Rule 56 status only after conversion by this Court, neither party has conducted any discovery. Nor has either party, pursuant to this District Court's LR 56.1, submitted evidentiary statements and responses to such statements to highlight which facts are disputed and which facts are agreed upon. Thus faced with only a scant evidentiary record (consisting primarily of two documents-the Position Description and Snyder's Affidavit), this Court looks as well to Snyder's First Amended Complaint ("FAC") to flesh out the factual background necessary to rule on State Officials' motion-something that would be inappropriate if dealing with a post-discovery Rule 56 motion (see Rule 56(e)).[2]

Facts

Over the course of his employment (at least seven years), Snyder moved up through the DOC ranks and eventually because Assistant Warden in September 2002 (FAC P 8). He held that position until his termination one year later (id.). Under the heading "COMPLETE, CURRENT AND ACCURATE STATEMENT OF POSITION ESSENTIAL FUNCTIONS," the Position Description presents an overall statement of the responsibilities of an Assistant Warden:

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[2] This approach is of course appropriate in the Rule 56 context (and cannot be complained about by Snyder), because it merely incorporates the even more lenient Rule 12(b)(6) or 12(c) standard that would require this Court to assume as true the facts alleged by Snyder in the FAC and to draw reasonable inferences in his favor (see, e.g., *R.J. Corman Derailment Servs., L.L.C. v. Int'l Union, Local Union 150*, 335 F.3d 643, 646-647 (7th Cir. 2003); *Pleva v. Norquist*, 195 F.3d 905, 911 (7th Cir. 1999)).

> Under administrative direction of the Warden . . . plans, organizes and directs the entire Program Services for the rehabilitation and resocialization of residents . . .; formulates operating procedures and rehabilitation programs for areas of assignments; interprets and carries out policies of the Department of Corrections and institutional superintendent; is administratively responsible and accountable for execution of policies and procedures and management of the institution while serving as Duty Warden.

That is followed by a more particularized list of six essential functions of the Assistant Warden job. For example, an Assistant Warden "plans, organizes and assumes direct responsibility" over a wide variety of prison services (Position Description P 1). In addition an Assistant Warden must supervise prison staff, conduct daily inspection tours of the prison, speak to the public about institutional programs and answer public correspondence (Position Description PP 3-5). Finally, an Assistant Warden must assist the Warden "in carrying out policies, rules and regulations of the institution," must take responsibility for the execution of DOC policies and procedures when he serves as Duty Warden and must be available to perform "other duties as required or assigned which are reasonably within the scope of" his articulated responsibilities (Position Description PP 2, 6).

Snyder never received the Position Description (S. Aff. P 4). And he maintains that the work he actually performed was more limited than the duties recited there (S. Aff. PP 8a-8p). Snyder sets forth a finite list of seven duties that he believes encompasses all of his duties as Assistant Warden (FAC P 12; S. Aff. PP 6, 7b-7g, 7j-7u): (1) taking responsibility for "functions of academic and vocational, chaplaincy, clinical services, leisure time activities, medical and dental services

for inmates," (2) monitoring inmate programs, (3) assisting "the Warden to ensure orderly operations of daily functions," (4) supervising, guiding and training staff, (5) interacting with the public, (6) conducting daily inspection tours of the facility and (7) counseling inmates.

During his stint as Assistant Warden, Snyder also "spoke with his superiors" and "spoke out" regarding several problems he noticed at DOC (FAC PP 53-58). Snyder's criticism stemmed largely from the processes used to fill certain employment vacancies (FAC PP 53-55). More specifically, Snyder vocalized concerns that (1) DOC employees were violating federal and state requirements, (2) vacancies were not being filled with qualified corrections personnel and (3) labor and other nongovernmental organizations were interfering with the hiring process (id.). Snyder also stated his belief that DOC facilities were not being staffed at appropriate levels, articulated his thoughts on the safety of employees, inmates and the public at DOC facilities and advocated generally for DOC reorganization (FAC PP 56-58).

At the time of his dismissal Snyder was explicitly informed "that he was being terminated because of his affiliation with the Republican Party and the Republican administration and his lack of Democratic political sponsorship" (FAC P 25). That promptly triggered this post-termination lawsuit.

Application of the Rule 56 Standards

Count I: Patronage Dismissal

Snyder first alleges that State Officials infringed his First Amendment rights when they terminated his employment

based on his political affiliation (FAC PP 19-25, 42). Freedom of association is of course one of the core protections afforded by the First Amendment (see, e.g., *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 755 (7th Cir. 2002)). So the starting point for analyzing a patronage claim is the general proposition that government employees may not be terminated because of their political affiliations (*Carlson v. Gorecki*, 374 F.3d 461, 464 (7th Cir. 2004)).

But recognizing that First Amendment rights must sometimes give way to other vital government interests, the Supreme Court has carved out an exception to that general rule (*Elrod v. Burns*, 427 U.S. 347, 361, 372, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); *Branti v. Finkel*, 445 U.S. 507, 518, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980)). Although that is frequently referred to as the "policymaker" or "confidential employee" exception, those shorthand labels do not characterize the required analysis with total accuracy.

Instead the analysis of whether a government employer may consider politics when staffing a job position requires a court to engage in a functional inquiry that asks whether "party affiliation is an appropriate requirement for the effective performance of the public office involved" (*Branti*, 445 U.S. at 518; see also *Carlson*, 374 F.3d at 464). While policymaking duties and access to confidential information are helpful guideposts to assess whether a position is within the purview of the Elrod-Branti exception, those job characteristics are neither required (nor are they necessarily sufficient) to reach the conclusion that personnel decisions involving a particular job position can be influenced by political affiliation (*Thompson*, 300 F.3d at 756; *Meeks v. Grimes*, 779 F.2d 417, 420 (7th Cir. 1985)).

As a threshold matter, it is essential to clarify what universe of job responsibilities dictates whether a job is within the Elrod-Branti exception. On that score our Court of Appeals has made it abundantly clear that a court must focus on the powers inherent in a position and not on the lesser duties that may be performed by any single occupant of that position (*Tomczak v. City of Chicago*, 765 F.2d 633, 640-41 (7th Cir. 1985); *Thompson*, 300 F.3d at 757 n.6). As *Tomczak*, 765 F.2d at 641 teaches:

> Thus, if an officeholder performs fewer or less important functions than usually attend his position, he may still be exempt from the prohibition against political terminations if his position inherently encompasses tasks that render his political affiliation an appropriate prerequisite for effective performance.

Snyder's FAC and Affidavit speak at length about what types of duties he says he did not do himself (FAC PP 26-31, 33-35, 37; S. Aff. PP 8a-8f, 8k-8p, 9-18). To that end he has included extensive information about numerous tasks in the Position Description that he never actually performed in his tenure as Assistant Warden, as well as delineating other activities that were not part of his ordinary job responsibilities (for example, dealing with confidential communications, having authority over DOC budgets or hiring and firing, and acting "authoritatively on any policy-making issue impacting the State of Illinois Department of Corrections or their operations") (S. Aff. PP 8a-8f, 8k-8p, 9-18). But all of that really misses the mark, because it simply does not address the fact that then or at any time thereafter State Officials may have found it useful or necessary, and were entirely free to, assign one or more of the other duties inherent in the Assistant Warden position (see *Heck*, 985 F.2d at 309).

Because it is definitively established that the applicability of the Elrod-Branti exception hinges on the universe of duties intrinsic in the Assistant Warden position (and not on the lesser part of that universe Snyder may have been called on to occupy generally or from time to time), the Position Description provides the most comprehensive, detailed and reliable source for ascertaining those intrinsic duties (*Thompson*, 300 F.3d at 756-57). And a thorough evaluation of the duties set out in the Position Description reveals that the Assistant Warden position falls squarely within the Elrod-Branti boundaries.[3]

Nothing in the Position Description suggests that an employee holding the Assistant Warden position necessarily creates formal overarching DOC policy or deals with confidential information. But as already suggested here, those two job characteristics do not define the entire breadth of the Elrod-Branti exception (see *Meeks*, 779 F.2d at 419-20). Instead our Court of Appeals pays heed to a key feature of bureaucratic government: Any employee who has a significant amount of discretionary responsibility to implement policy could also "reasonably serve to threaten the policy goals of the party in power" (*Selch v. Letts*, 5 F.3d 1040, 1044 (7th Cir. 1993)).

Indeed, the very existence of that responsibility renders all the more threatening to those policy goals the voicing of

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[3] This Elrod-Branti determination is entirely appropriate at the summary judgment stage, because the Position Description so clearly and completely describes the job duties of the Assistant Warden position that no reasonable jury could conclude that the inherent duties of the Assistant Warden position were anything other than as they were articulated in that document (see *Pleva*, 195 F.3d at 912).

certain types of public criticism by the official in question that can subvert the attainment of those goals. It is obvious that trenchant criticism by an insider gets more attention (from the media, for example) and is more likely to be believed-even if it is wholly unjustified. And in light of that reality, government employers can consider political affiliation when making employment decisions about any position in which an employee is "vested with substantial discretionary authority in the implementation of the policy goals of elected officials" (*Upton v. Thompson*, 930 F.2d 1209, 1215 (7th Cir. 1991)).

Plainly the Position Description includes numerous duties inherent in the Assistant Warden position that embody just the kind of discretionary responsibility to implement State Officials' policy objectives concerning DOC of which Elrod and Branti are cognizant. For example, the Position Description requires that an Assistant Warden "plans, organizes and directs the entire" program of inmate "rehabilitation and resocialization." It mandates that an Assistant Warden actually "formulate operational procedures and rehabilitation programs." It explicitly states that an Assistant Warden "interprets and carries out [DOC] policies." And it specifies an Assistant Warden who must supervise staff, speak to the public and always be ready and willing to perform other duties assigned so him "that are reasonably within the scope" of his employment. Each of those job responsibilities presents myriads of opportunities for an Assistant Warden to influence how DOC policy plays out on the front lines on a daily basis.

Significantly, all of those job duties are also quite broad in scope and cannot by definition be defined in precise and limited terms (*Elrod*, 427 U.S. at 368). Instead they are the types of responsibilities that must be augmented and fine-tuned as they unfurl -- a task that will inevitably be fleshed

out with the individual's own policy views (see *Pleva*, 195 F.3d at 913; *Thompson*, 300 F.3d at 756).[4]

To be sure, the Position Description says that an Assistant Warden is to carry out his responsibilities "under administrative direction of the Warden." But that is merely reflective of the type of hierarchy involved in any organization of size -- it does not at all connote a situation in which the Warden gives direct heed to, or even oversees directly, all of the particulars of the Assistant Warden's performance. Instead the level of substantial responsibility for policy implementation is not dependent on an employee's precise location in a hierarchical structure (*Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981)). And a government employee need not have unfettered discretion or ultimate decisionmaking authority to trigger the Elrod-Branti exception (*id.*; *Americanos v. Carter*, 74 F.3d 138, 142 (7th Cir. 1996)).

To fulfill several of his prescribed duties (such as creating a program of rehabilitation and resocialization for inmates, formulating DOC operating procedures, interpreting and carrying out DOC policy, developing strategies for staff management and supervision and generally assisting the Warden in carrying out DOC policies, rules and regulations), an Assistant Warden must inevitably participate in discussions about a whole slew of programmatic and operational issues --

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[4] *Tomczak*, 765 F.2d at 641 cautions that courts should not take an "unduly myopic view of the role of politics in the seemingly apolitical context of universal provision of services." That warning seems exceedingly applicable here, given that an Assistant Warden regularly makes choices about how best to implement policies in the highly politicized criminal justice area.

topics on which there is ample "room for principled disagreement on goals or their implementation" (*Nekolny*, 653 F.2d at 1170). And simply engaging in such dialogues is enough to bring the Assistant Warden position within the Elrod-Branti ambit (*Americanos*, 74 F.3d at 142). Indeed, Snyder's own FAC P 70 alleges that State Officials were aware of his "activities in furtherance of public policy."

Finally, *Branti*, 445 U.S. at 518 teaches that political affiliation is also an appropriate consideration where an employee acts as a governmental spokesperson (and see, e.g., the application of *Branti* in *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 240 n. 8 (1st Cir. 1986)). Because the Position Description specifies that an Assistant Warden "speaks to lay and professional groups regarding various institutional programs" and "answers correspondence from the general public," State Officials had a legitimate interest in ensuring that any person who held the Assistant Warden position would accurately represent their policy viewpoints in his interactions with the public (see *Martinez-Sanes v. Turnbull*, 318 F.3d 483, 489-90 (3d Cir. 2003)).

Given the duties that the Position Description requires an Assistant Warden to perform-including at least some discretionary responsibility for policy implementation pursuant to meaningful discussion, as well as significant interaction with the public-State Officials could properly have determined that membership in the same political party as Blagojevich was essential to the job.[5] Based on that analysis,

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[5] In that respect, State Officials could well have viewed the criticisms that Snyder voiced (FAC PP 53-58, set out in the penultimate paragraph of the Facts section of this opinion) as themselves politically motivated, intended to serve the Republican Party cause with which Snyder was affiliated by casting

the Assistant Warden position is well within the Elrod-Branti exception. Summary judgment in State Officials' favor is therefore warranted on Count I, because no reasonable jury could conclude that Snyder's termination was unlawfully linked to his political affiliation (see *Branti*, 445 U.S. 518, 63 L. Ed. 2d 574).[6]

Count II: Retaliation

Next Snyder asserts that his First Amendment rights were infringed because his termination was also motivated by "positions he had taken on matters of public concern" (FAC 55 59, 62). That claim of retaliation based on speech is analytically distinct from (although it is related to) Snyder's Count I patronage claim (see *Ryan v. Ill. Dep't of Children &*

Blagojevich's administration and his Democratic Party in a bad light. See the later discussion as to Snyder's Count II.

[6] Snyder Mem. 4 unpersuasively invokes *Ruffino v. Sheahan*, 218 F.3d 697, 700 (7th Cir. 2000) to argue that bringing an Assistant Warden within the Elrod-Branti exception is a "remarkable extension of the policymaker line of cases." To the contrary, nothing in the political patronage jurisprudence suggests that considering the number of employees who hold a position with a given title in a multibranch organization is part of the Elrod-Branti inquiry. In fact, *Ruffino* itself properly rested on a finding about the functions that were performed by employees who held the position in question, not on the sheer number of employees serving in the position (id. at 700-01). Moreover, here there are some 50 to 100 Assistant Wardens in all of Illinois (the exact number is not precisely identified in the pleadings, but it is not critical) (FAC PP 10-11; S. Mem. 4)-in all events, far below "the hundreds of deputy sheriffs in Cook County" alone who were found to be outside the Elrod-Branti exception in *Ruffino*, 218 F.3d at 700-01.

Family Servs., 185 F.3d 751, 759 (7th Cir. 1999); *Heideman v. Wirsing*, 7 F.3d 659, 661-62 (7th Cir. 1993)).

Undoubtedly "the right to criticize public officials is at the heart of the First Amendment's right of free speech" (*Wilbur v. Mahan*, 3 F.3d 214, 215 (7th Cir. 1993)). But while employees no longer shed all First Amendment rights at the door of their government employer,[7] the unique concerns of government qua employer (most notably requiring the efficient delivery of public services) mean that government employees can expect their First Amendment speech rights to be somewhat circumscribed in the context of their employment (*id.* at 216).

Whether Snyder's speech is constitutionally protected is a question of law for the court (*Sullivan v. Ramirez*, 360 F.3d 692, 698 (7th Cir. 2004)). And *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1967) announced a two-part test to evaluate whether a governmental employer who terminates an employee based on his or her speech has violated the First Amendment: First the court asks whether the employee was speaking on a matter of "public concern" (*Warzon v. Drew*, 60 F.3d 1234, 1238 (7th Cir. 1995)), and if so the court balances the employee's First Amendment interests against the interests of the government employer in the circumstances at issue (*id.*).

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[7] Contrast Justice Holmes' famous oversimplification in *McAuliffe v. Mayor, etc., of New Bedford*, 29 N.E. 517, 155 Mass. 216 (Mass. 1892):

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.

But a series of cases from our Court of Appeals has consistently held that the Pickering balancing approach does not come into play -- it is obviated -- when an employee within the Elrod-Branti exception "has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies" *(Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964, 971 (7th Cir. 2001)). In addition to Vargas-Harrison, see, e.g., the earlier decisions in *Wilbur*, 3 F.3d at 218, *Warzon*, 60 F.3d at 1239, *Ryan*, 185 F.3d at 759 and *Bonds v. Milwaukee County*, 207 F.3d 969, 977-78 (7th Cir. 2000)).

Because it has already been held that Snyder, as Assistant Warden, fits within the contours of the Elrod-Branti exception, and because for analytical purposes it may be assumed arguendo that Snyder's comments implicated matters of public concern because they bore on the Illinois penal system and corresponding budgetary considerations (see *Bonds*, 207 F.3d at 980), it remains to consider whether the character of his speech conformed to the Vargas-Harrison description. And on that score Snyder's own FAC allegations have talked him out of court.

Snyder has expressly acknowledged that all of the attacks he launched at his superiors were aimed at personnel decisions, organizational choices and related safety issues. Most of his criticisms addressed how State Officials were going about filling numerous employment vacancies, while the remainder touched on DOC safety and organization. And those matters clearly implicated work-related policy choices within Snyder's ken: It will be remembered that the Position Description makes the Assistant Warden responsible for supervising staff and conducting daily inspection tours and states the Assistant Warden "interprets and carries out" DOC policies, assists the Warden in "carrying out policies, rules

and regulations of the institution ensuring orderly operation of daily functions of the institution" and "formulates operating procedures."

Far from being "forms of expression that have no conceivable bearing on his job" (*Wilbur*, 3 F.3d at 217), all of Snyder's criticisms were intimately related to several of his concrete job responsibilities -- and they were most certainly linked to his more broad and discretionary duties. So this Court properly eschews Pickering balancing and holds that even if State Officials' decision to terminate Snyder relied entirely on his critical statements, he also fails on his retaliation claim as a matter of law.[8]

Count III: Due Process

Finally, Snyder contends that he had a property interest in his continued employment with DOC and that State Officials deprived him of his Fourteenth Amendment right to due process when they terminated him (and effectively extinguished that property interest) as they did (FAC PP 80, 82-83). But as before, that claim too is a loser.

Establishing a due process violation is a two-step process that requires a plaintiff to show first that he had a property interest and next that he was deprived of that interest without due process of law (*Phelan v. City of Chicago*, 347 F.3d 679,

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[8] Indeed, the same conclusion would follow even if a Pickering analysis were called for. In those terms State Officials' interests in ensuring that the Assistant Warden was performing his duties satisfactorily, in maintaining harmony in the workplace and in assuring that Snyder would conduct himself in a manner commensurate with their policy objectives would surely trump Snyder's First Amendment claim.

681 (7th Cir. 2003)). Here Snyder falls at step one, so there is no need to consider the second step.

For a government employee, the existence of a property interest in continued employment requires that interest to have been created either by an independent source such as a state statute or via a clearly implied promise of continued employment made by a government official with the proper authority (*Phelan, id.*; *see also Zemke v. City of Chicago*, 100 F.3d 511, 513 (7th Cir. 1996)). With no state statute to look to, Snyder must perforce follow that second path. To that end he attempts to stake his bet on a comment by Blagojevich that assured "Snyder and others employed by the State of Illinois that he was not looking to purge state government of different men and women who were hired during Republican administrations" and that said "if men and women working for the State of Illinois were satisfactorily performing necessary jobs, they would not be terminated" (FAC PP 78, 80).

But Snyder loses his bet immediately, because even if such amorphous statements were urged to be viewed as firm commitments of ongoing employment to individuals who were neither spoken to nor named nor described in the statements (a highly dubious notion at best-see, e.g., *Tolmie v. United Parcel Serv., Inc.*, 930 F.2d 579, 581 (7th Cir. 1991)), Blagojevich did not himself have any authority to make such an employment promise that would bind the State of Illinois (*see Shlay v. Montgomery*, 802 F.2d 918, 921-22 (7th Cir. 1986)). As such, his asserted statements could never form the basis for a "mutually explicit understanding" that could give Snyder a legitimate property interest in his job as Assistant Warden (*Wolf v. Fitchburg* 870 F.2d 1327, 1334 (7th Cir. 1989)).

FAC PP 74-77 speak of three individual sources -- the Illinois Constitution, numerous Illinois statutes and an Executive Order -- as purportedly conferring on Blagojevich the authority to make a promise of continued employment to Snyder (FAC PP 74-77). This Court's March 9, 2004 memorandum opinion and order has already held that Snyder's invocation of constitutional and statutory references as claimed sources of Blagojevich's authority is entirely without merit. As for Executive Order No. 1 (B-W Ex. F), it merely reflects that Blagojevich held the ultimate budgetary reins in Illinois and could institute a hiring and promotion freeze to stabilize the governmental payroll -- it does not create a reasonable inference, let alone state, that Blagojevich had control over DOC employment decisions. In sum, the statements that the FAC ascribes to Blagojevich created no authorized and binding employment contract between Snyder and the State of Illinois and thus could not create a property interest in Snyder's job (*Pleva*, 195 F.3d at 915).

Snyder Mem. 11 makes one last ditch effort to salvage his claim: Even in the absence of a valid oral contract between Snyder and Blagojevich, he says he could still have "a legitimate claim of entitlement" stemming from "legitimate and reasonable reliance on a promise from the state." But that attempted bootstrapping fails as well, for any claimed reliance on the statements ascribed to Blagojevich -- an official without actual authority to make a firm and binding commitment -- would be neither legitimate nor reasonable (*see Shlay*, 802 F.2d at 921).

All roads thus lead to the same destination: the absence of a property interest in Snyder's job as Assistant Warden. And without any property interest in his continued employment, Snyder's due process claim also fails as a matter of law (*Pleva*, 195 F.3d at 915).

Conclusion

Even under the most lenient Rule 56 standard, no reasonable jury could conclude that Snyder can prevail on any of his Section 1983 claims against State Officials.[9] That being so, State Officials' motion is granted in its entirety, and FAC Counts I, II and III are dismissed. One final point: Because Snyder's only remaining claim is the FAC Count IV common law claim for defamation against American Federation of State, County and Municipal Employees and its directors Henry Bayer and Buddy Maupin, which now lacks any federal anchor this Court sua sponte dismisses that claim as well (but without prejudice, of course -- see, e.g., *Pleva*, 195 F.3d at 918), so that this entire action is dismissed.

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that final judgment is entered dismissing First Amended Complaint Counts I, II and III with prejudice. Count IV is dismissed without prejudice.

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[9] It is also worth observing that because State Officials' conduct plainly does not violate Snyder's clearly established statutory or constitutional rights, State Officials are also shielded from liability by the umbrella of qualified immunity (see, e.g., *Pounds v. Griepenstroh*, 970 F.2d 338, 339 (7th Cir. 1993)).

Milton I. Shadur
Senior United States District Judge
Date: August 20, 2004
JUDGEMENT IN CIVIL CASE

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 04 C 0129

[Filed August 20, 2004]

THOMAS SNYDER, Plaintiff,	)
v.	)
ROD BLAGOJEVICH, et al. Defendants.	)

JUDGMENT IN A CIVIL CASE

IT IS HEREBY ORDERED AND ADJUDGED that final judgment is entered dismissing First Amended Complaint Counts I, II and III with prejudice. Count IV is dismissed without prejudice.

Michael W. Dobbins, Clerk of Court

/s/ _____
Sandy Newland, Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 04 C 0129

[Filed August 20, 2004]

THOMAS SNYDER, Plaintiff,	)
v.	)
ROD BLAGOJEVICH, et al. Defendants.	)

MINUTE ORDER

ASSIGNED JUDGE: Honorable Milton I. Shadur

State Official's motion is granted [12-1] in its entirety, and FAC Counts I, II and III are dismissed. Because Snyder's only remaining claim in the FAC Count IV common law claim for defamation against American Federation of the State, County and Municipal Employees and its directors, which now lacks any federal anchor, this court *sua sponte* dismissed that claim as well (but without prejudice), so that this entire action is dismissed. Entered Memorandum Opinion and Order terminating case. Mailed Notice.

This docket entry was made by the Clerk on August 23, 2004.

ATTENTION:

This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a min. order or other document is enclosed, please refer to it for additional information.

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 04 C 0129

[Filed June 4, 2004]

THOMAS SNYDER,	)
Plaintiff,	)
	)
v.	)
	)
ROD BLAGOJEVICH, et al.	)
Defendants.	)
	)

MEMORANDUM ORDER

This court has taken a quick threshold look at the June 1, 2004 response by counsel for plaintiff Thomas Snyder ("Snyder") to the Fed. R. Cir. P. ("Rule") 12(c) motion for judgment on the pleadings previously filed by Governor Rod Blagojevich and Illinois Department of Corrections Director Roger Walker, Jr. (collectively "State Officials"). Although at yesterday's status hearing this Court granted State Officials' counsel until June 17 to file a reply memorandum, this memorandum order is issued *sua sponte* in the hope of

avoiding what appears to be the needless expenditure of time and effort.

State Officials' motion relies in substantial part on the Position Description promulgated by the Illinois Department of Central Management Services for the Assistant Warden job at Taylorville Correctional Center (the position held by Snyder before his assertedly unconstitutional termination), a document that is attached as Ex. A to State Officials' Answer to Snyder's First Amended Complaint ("FAC"). Although it is true that Rule 12(c) (like Rule 12(b)(6)) refers to the potential conversion of such a motion to a Rule 56 summary judgment motion if "matters outside the pleadings are presented to and not excluded by the court," it is also implicit in Rule 12(c) that if there are conflicts in the pleadings the case must be looked at from the perspective of the plaintiff's version (again just as is the case with a Rule 12(b)(6) motion). And in this instance Answer ¶12 and its attachment of the Position Description adopt a stance that is at odds with FAC ¶12, which describes Snyder's duties and responsibilities (1) as "well defined and of limited scope" and (2) as comprising just seven itemized functions.

What that appears to mean, then, is that the case may not fit under the Rule 12(c) rubric, for which purpose this Court would be required to accept Snyder's more restrictive statement. At the same time, this Court is troubled by what seem to be near- frivolous quibbles advanced by Snyder – that the Position Description is not a public record and that it does not define the scope of an Assistant Warden's position. Indeed, Snyder's Mem. 3 cites to *Thompson v. Ill. Dep't of Professional Regulation*, 300 F.3d 750 (7th Cir. 2002), even though that case looked at a comparable exhibit attached to the plaintiff's pleading there "as the sole uncontradicted description of the duties of the [office]" (*id.* at 755).

There appears to be no good reason why the parties should dispute, or why this Court should be compelled to resolve their dispute, as to whether judicial notice may be taken of the Position Description. To obviate the need to address that collateral issue, this Court will consider the Position Description as a "matter [ ] outside the pleadings" so as to convert the current motion into one akin to a Rule 56 motion. If Snyder and his counsel can, in the objective good faith required of every litigant and lawyer under Rule 11(b), dispute that the duties and responsibilities set out in the Position Description were those of the Assistant Warden position at the time Snyder held it, that must be done by an affidavit filed in this Court's chambers (and delivered to State Officials' counsel) by the same June 17 due date that has been established for State Officials' reply memorandum.

This memorandum order should not be misunderstood as an expression of opinion by this Court as to the merit or lack of merit of State Officials' motion. It is rather intended to clear away some apparently unnecessary underbrush that could otherwise stand in the path of an appropriate and more expeditious resolution of the motion.

/s/ _____
Milton I. Shadur
Senior United States District Judge

Date: June 4, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 04 C 0129

[Filed June 4, 2004]

THOMAS SNYDER,	)
Plaintiff,	)
	)
v.	)
	)
ROD BLAGOJEVICH, et al.	)
Defendants.	)
	)

MEMORANDUM ORDER

If Snyder and his counsel can, in the objective good faith required of every litigant and lawyer under Rule 11(b), dispute that the duties and responsibilities set out in the Position Description were those of the Assistant Warden position at the time Snyder held it, that must be done by an affidavit filed in this Court's chambers by the same June 17 due date that has been established for State Official's reply memorandum.

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case No. 05-3019

[Filed December 20, 2005]
[Published February 10, 2006]

MARK A PIERSON, Warden Plaintiff- Appellee,	)
v.	) Appeal from the) United States District) Court for the Northern
ROD BLAGOJEVICH, Governor and ROGER E. WALKER, JR., Defendants-Appellants.	) District of Illinois,) Eastern Division

Before BAUER, POSNER and EVANS, Circuit Judges.

Published February 10, 2006.*

* This opinion was originally issued as an unpublished order on December 20, 2005. Upon request, the panel has determined that this decision should now issue as a published opinion.

ORDER

PER CURIAM. Rod Blagojevich and Roger Walker appeal the district court's denial of their motion for judgment on the pleadings based on qualified immunity. Appellants now ask for summary reversal based on this court's opinion in *Riley v. Blagojevich*, 425 F.3d 357 (7th Cir. 2005). Appellees respond that if this court acts summarily, it should affirm the district court's order under *Kiddy-Brown v. Blagojevich*, 408 F.3d 346 (7th Cir. 2005).

Appellee Mark Pierson sued Governor Blagojevich and Walker, the director of the Illinois Dept. of Corrections, alleging that defendants improperly terminated Pierson from his position as warden at a state prison. Pierson, who began employment under prior Republican administration, claims he was fired because he was not an ally of the new Democratic administration and because he publicly criticized his superiors.

Defendants attached to their amended answer a copy of the job description for Pierson's warden position that is kept on file at the Illinois Department of Central Management Services (CMS). The essential functions identified in the job description include directly the overall operations and programs of Pinckneyville Correctional Center, formulating "policy, procedures, rules, regulations, and institutional directives for employees and inmates," and planning and approving the facility's fiscal budget.

Defendants ask for summary reversal under *Riley*, which held that an official job description, if reliable, is the correct basis for the court's determining whether political affiliation is a legitimate requirement of the job. 425 F.3d at 364. And the job description here - even more than the job description

of assistant warden at issue in *Riley* - clearly confers policy-making discretion. The question is thus the reliability of the job description attached to the defendants' answer. Defendants submit a stipulation from Pierson in which he states that the job description attached to the answer is indeed a "true and correct copy of a Position Description contained in the file of the Illinois Department of Central Management Services ("CMS") for position number 40070-29-62-000-00-01, corresponding to Position Title of Senior Public Service Administrator (working title of Warden) at Pinckneyville Correctional Center." According to the defendants' affidavit attached to the amended answer, and not contested by Pierson, this job description has been in effect from May 1, 1999, to the present; it was not concocted by Governor Blogojevich. Pierson does not deny that he signed the stipulation, which is materially identical to the stipulation singed by appellant Snyder and found to be sufficient by this court in the *Riley* appeal. This appeal is therefore controlled by *Riley*. The district court's order denying appellants' motion for judgment on the pleadings is therefore reversed and the case remanded with directions to enter judgment for the defendants.

REVERSED AND REMANDED.

_____

Clerk of the United States Court
Of Appeals for the Seventh Circuit.

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 04 C 939

[Filed June 24, 2005]

MARK PIERSON,
Plaintiff,

v.

ROD R. BLAGOJEVICH and
ROGER WALKER, JR.,
Defendants.

MEMORANDUM OPINION

SAMUEL DER-YEGHIAYAN, District Judge

This matter is before the court on Defendants' renewed motion for judgment on the pleadings. For the reasons stated below, we grant in part and deny in part the motion for judgment on the pleadings.

BACKGROUND

Plaintiff Mark Pierson ("Pierson") alleges that he was employed as a warden at Pickneyville Correctional Center, which is a state penal institution. Pierson alleges that his employment was terminated in September of 2003. According to Pierson, Defendants terminated his employment because of Pierson's involvement with the Republican party and because the Governor of Illinois ("Governor") and the Director of the Illinois Department of Corrections ("IDOC") did not consider Pierson "to be a political ally of the Democratic administration." (FA Par. 14). Pierson also claims that he spoke out on issues of public concern such as the unfilled vacancies at the IDOC. Pierson claims that his employment was also terminated in retaliation for his public statements about the vacancies. Pierson also alleges that the Governor spoke to Pierson and told Pierson that he was not going to fire all employees that were hired by the prior Republican administration and that such employees would be able to continue their employment as long as they performed their jobs satisfactorily. Pierson includes in his amended complaint a claim alleging violations of his First Amendment rights under 42 U.S.C. § 1983 ("Section 1983") (Count I), a Section 1983 retaliation claim (Count II), and a Section 1983 due process claim (Count III).

LEGAL STANDARD

A party is permitted under Federal Rule of Civil Procedure 12(c) to move for judgment on the pleadings after the parties have filed the complaint and the answer. Fed. R. Civ. P. 12(c); *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend,* 163 F.3d 449, 452 (7th Cir. 1998). The courts apply the Rule 12(b) motion to dismiss standard for Rule 12(c) motions and thus the court may "grant a Rule

12(c) motion only if 'it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief.'" *Id.* (quoting *Crags, Inc. v. General Elec. Capital Corp.*, 12 F.3d 686, 688 (7th Cir.1993)). The court, in ruling on a motion for judgment on the pleadings, must "accept all well-pleaded allegations in the complaint as true," *Forseth v. Village of Sussex,* 199 F.3d 363, 368 (7th Cir. 2000), and "view the facts in the complaint in the light most favorable to the nonmoving party . . . ." *Northern Indiana Gun & Outdoor Shows, Inc.*, 163 F.3d at 452(quoting *GATX Leasing Corp. v. National Union Fire Ins. Co.*, 64 F.3d 1112, 1114 (7th Cir. 1995)). The main difference between a Rule 12(b) motion and a Rule 12(c) motion is that a Rule 12(b) motion may be filed before the answer to the complaint is filed, whereas, a Rule 12(c) motion may be filed "after the pleadings are closed but within such time as not to delay the trial." *Id.* n.3.

A court may rule on a judgment on the pleadings under Rule 12(c) based upon a review of the pleadings alone. *Id.* at 452. The pleadings include the complaint, the answer, and any written instruments attached as exhibits, such as affidavits, letters, contracts, and loan documentation. *Id.* at 452-53. In ruling on a motion for judgment on the pleadings a "district court may take into consideration documents incorporated by reference to the pleadings... [and] may also take judicial notice of matters of public record." *U.S. v. Wood,* 925 F.2d 1580, 1582 (7th Cir.1991). If the court considers matters outside the pleadings, the court should convert the motion for judgment on the pleadings into a motion for summary judgment. *Northern Indiana Gun & Outdoor Shows, Inc.,* 163 F.3d at 453 n.5.

DISCUSSION

I. First Amendment Discrimination Claim (Count I)

Defendants argue that they are entitled to judgment on the pleadings on the First Amendment discrimination claim because an appropriate consideration for the warden position held by Pierson was his political affiliation. Generally, a public employee cannot be subjected to "adverse job actions because of [his] political beliefs." *Carlson v. Gorecki,* 374 F.3d 461, 464 (7th Cir. 2004). A public employer may take an adverse action against an employee because of his political affiliation if "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Kiddy-Brown v. Blagojevich,* 408 F.3d 346, 355 (7th Cir. 2005)(quoting *Branti v. Finkel,* 445 U.S. 507, 518 (1980)). The Seventh Circuit has found that a public employee's political affiliation is a legitimate consideration in regards to a public position if the "position involves confidential and policymaking responsibilities." *Id.* at 354-55 (defining a policymaking position as a position in which the employee is "authoriz[ed], either directly or indirectly," to provide "meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation.").

The Seventh Circuit recently entered a decision in *Kiddy-Brown v. Blagojevich,* 408 F.3d 346 (7th Cir. 2005), reviewing a district court's ruling on the defendant's motion for judgment on the pleadings which is similar to the instant action, *Id.* at 349-50. In *Kiddy-Brown*, the plaintiff was employed as a warden for the IDOC, similarly to Pierson who was also employed as a warden. *Id.* The plaintiff in *Kiddy-Brown* likewise brought suit alleging that she was fired

because of her political affiliation. *Id.* The court in *Kiddy-Brown* evaluated whether or not party affiliation was an appropriate requirement for the plaintiff's warden position and concluded that, since all allegations had to be viewed in favor of the plaintiff at the pleadings stage, that there was not sufficient evidence "to conclude that the warden position involved the kind of policymaking duties that would make political affiliation an appropriate requirement for the position." *Id.* at 356.

Defendants argue that the warden position occupied by Pierson required Pierson to engage in policymaking, to implement policy, and to act as a spokesperson. Defendants argue that Pierson has pled himself out of court by admitting in his own affidavit to facts that show that he engaged in the above activities. However, no such admissions were made in the affidavit. Merely because Pierson acknowledged that he did activities such as training and directing staff and planned and directed operations and programs, does not show that he engaged in the type of activities that would make Pierson's political affiliation an appropriate consideration for his warden position.

Defendants also rely heavily upon the position statement for the warden position which Defendants attached to their amended answer. As the Court in *Kiddy-Brown* noted in the beginning of its analysis on this issue, when ruling on a motion for judgment on the pleadings, we "must view all allegations in the pleadings in the light most favorable to [the non-movant.]" *Id.* at 355. In *Kiddy-Brown,* as in this case, the Court was presented with a position statement for the plaintiff's warden position and the court concluded that the position statement was not sufficient evidence to show that the warden position involved the type of policymaking duties that would render the plaintiff's political affiliation a valid

consideration for her position. *Id.* at 353-56. In the instant action, the position statement presented by Defendants is evidence of what duties and activities were associated with the warden position, but it is not sufficiently conclusive evidence on that point. Pierson contests Defendants' assertion that the warden position involved policy making or implementing activities or involved him acting as a spokesperson. Defendants also argue that, unlike in *Kiddy-Brown,* Pierson has not disputed the authenticity of the position statement. However, this distinction, even if true, is not sufficient to distinguish *Kiddy-Brown* from the instant action to such an extent as to render the holding of *Kiddy-Brown* inapplicable to the instant action.

Defendants also argue that Pierson improperly focuses on the duties that he actually performed, whereas the focus should be on the inherent duties of the warden position. (Reply 3). Defendants are correct that the focus is properly upon the duties inherent in the warden position. *See Tomczak v. City of Chicago,* 765 F.2d 633, 640-41 (7th Cir. 1985)(stating that *"Elrod* and *Branti* require examination of the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office.") However, Defendants incorrectly assert that Pierson's arguments are focused upon only the duties that Pierson actually performed. For example, Pierson argues that his "duties and responsibilities were well defined and of limited scope." (Ans. 2). Pierson also specifies what the "duties and responsibilities" that "were inherent in the position of Warden at Pickneyville Correctional Center." (Ans. 2). Thus, Defendants are incorrect when they assert that Pierson failed to address the duties that are inherent to the warden position. Therefore, we deny Defendants' motion for judgment on the pleadings on the First Amendment claim (Count I).

II. Retaliation Claim (Count II)

Defendants argue that they are entitled to judgment on the pleadings on the retaliation claim because Pierson publically criticized his superiors. A governmental entity is prohibited from "retaliat[ing] against its employees for engaging in constitutionally protected speech." *Kiddy-Brown,* 408 F.3d at 357 (quoting *Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964, 970 (7th Cir.2001)). For a First Amendment retaliation claim, a plaintiff is required to establish: "(1) that [ ] he engaged in constitutionally-protected speech and (2) that h[is] speech was 'a substantial or motivating factor in the defendants' challenged actions.'" *Id.* (quoting in part *Horwitz v. Bd. of Educ. of Avoca Sch. Dist. 37,* 260 F.3d 602, 618 (7th Cir.2001)). The governmental entity has the "burden of justifying the employee's discharge." *Id.* The Seventh Circuit has provided further guidance in regards to a First Amendment retaliation claim indicating that, in general, "if a public employee's speech was on a matter of public concern, '[the speech] is protected if h[is] interest in that expression outweighs the State's interest in promoting the efficiency of its public services.'" *Id.* (quoting in part *Caruso v. De Luca,* 81 F.3d 666, 670 (7th Cir. 1996)). The Seventh Circuit has also explained that an employee of a public entity, "does not shed [his] First Amendment rights at the steps of the government building," but on the other hand, the public employee does not enjoy an absolute right to speech. *Id.* at 357-58 (quoting in part *Vargas-Harrison,* 272 F.3d at 970)(quoting *Picketing v. Board of Education,* 391 U.S. 563 (1968) for the proposition that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."). The court, in determining whether there has been unlawful retaliation in violation of the First Amendment must balance

the interests of: 1) "the [employee], as a citizen, in commenting on matters of public concern," and 2) "the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* (noting that "in cases involving the dismissal of an employee in a policymaking position, 'there is no need for a fact-specific analysis of the circumstances of each case' mandated by *Pickering*" and that "the First Amendment does not prohibit the discharge of a policy-making employee when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies."). *Id.*

In the instant action, Pierson alleges in his amended complaint that "he spoke out on matters of public concern" such as the need to fill vacancies in the IDOC with qualified personnel. (A Compl. Par. 45-46). Pierson also alleges that his statements were made out of concern for "the safety of the IDOC facilities." (A Compl. Par. 48). The Court in *Kiddy-Brown* was presented with similar allegations. In *Kiddy-Brown*, the plaintiff claimed that she spoke out on matters of public concern in order to act as a responsible citizen. *Id.* at 358. The Court in *Kiddy-Brown* found that based on the allegations by the plaintiff, that at the "early stage of the proceedings," the plaintiff's interest outweighed any state interest, and her speech was a substantial factor in her termination. *Id.* at 359. We likewise agree in the instant action that, accepting for the purposes of the instant motion that Pierson's allegations are true, the interest alleged by Pierson outweighs any state interest and that his speech was a motivating factor in his termination. Therefore, we deny Defendants' motion for judgment on the pleadings on the retaliation claim. Although, we are denying Defendants' motion, we shall provide the same admonition that the Court in *Kiddy-Brown* provided on this issue, and note that when we

are "presented with a better-developed record," we may find that Pierson's "factual allegations do not portray accurately h[is] situation." *Id.*

III. Due Process Claim (Count III)

Defendants argue that they are entitled to judgment on the pleadings on the due process claim. In order for a plaintiff to show a violation of his due process rights, the plaintiff must establish: "(1) that the claimed interest is a protected property or liberty interest under the fourteenth amendment; (2) that 'the alleged loss . . . amounted to a deprivation'; and (3) that the deprivation was without due process of law." *Polenz v. Parrott,* 883 F.2d 551, 555 (7th Cir.1989). Defendants argue that Pierson does not have a protected property interest in continued employment.

Defendants argue that the Governor lacked authority to make any employment decisions for the IDOC and that the Governor's assurances therefore did not create any protectable property interest in employment. Pierson alleges in his complaint that the Governor made oral representations to himself and other IDOC employees indicating that the employees would not be fired merely because they had been hired during the Republican administration. The Court in *Kiddy-Brown* was presented with the same argument regarding the Governor's lack of authority and the Court concluded that the plaintiff had not shown that the Governor had authority to bind the state to uphold the Governor's promises of future employment. *Kiddy-Brown,* 408 F.3d at 363. Likewise, in the instant action, Pierson has failed to point to sufficient materials in the pleading that would indicate that the Governor had authority to make such a promise. *See Wolf v. City of Fitchburg,* 870 F.2d 1327, 1334 (7th Cir. 1989)(stating that "[i]t is now firmly established that the 'mutually explicit

understandings' that constitute property interests under the holding of *Perry* cannot be based on the representations of government officials who are not authorized to make such representations."). In addition, even if the Governor had authority to make a promise of future employment to Pierson, and even when viewing the pleadings in the light most favorable to Pierson, there is no indication that an oral employment contract for permanent employment was formed by the Governor's statements.

Under Illinois law, the employment of an individual is presumed to be at will employment and thus, "[a]n employee bears the burden of overcoming the presumption of 'at will' employment by showing that the parties contracted otherwise." *Kiddy-Brown,* 408 F.3d at 363. If an employment contract is based upon alleged oral statements by an employer, "the plaintiff must establish that the offer was 'clear and definite' and supported by adequate consideration." *Id.* (stating that "[u]nder Illinois law, an offer is clear and definite as long as 'an employee would reasonably believe that an offer has been made.'"). As the court noted in *Kidd Brown,* "Illinois courts have held that, when employers tell employees that they will 'always have a job' or that they will 'never have to anticipate a layoff' or that they were being offered a 'permanent position,' such statements are not sufficiently clear and definite to constitute an offer of permanent employment." *Id.* Rather, such statements have been deemed by the Illinois courts as "'optimistic expressions about the future' and 'informal expressions of goodwill and hope that naturally occur' between employer and employee." *Id.*

The pleadings do not show that the Governor's alleged statements were sufficiently "clear and definite to create a protectable property interest in future employment." *Id.* Pierson merely alleges that the Governor stated in a general

fashion that he "was not going to purge state [sic] government of different men and women who were hired during Republican [sic] administrations" and that the Governor "promised that if men and women working for the State of Illinois were satisfactorily performing necessary jobs, they would not be terminated by his administration." (A Compl. Par. 69). Such statements are merely general promises and could not be reasonably interpreted to mean that any specific employee will be guaranteed future employment with the IDOC. There is no indication in the pleadings that the Governor made a statement, specifically regarding Pierson, which clearly indicated that Pierson would continue to be employed by the IDOC. In *Kiddy-Brown*, the plaintiff alleged that the Governor made similar statements and the court held that the statements were not "sufficiently clear and definite to establish a definite property interest in continued employment." *Id.* As the Court found in *Kiddy-Brown,* the Governor's statements referred to in the instant action "are 'nothing more than optimistic expressions about the future" and "constituted expressions of goodwill and hope." *Id.* at 365. Therefore, we grant Defendants' motion for judgment on the pleadings on the due process claim (Count III).

IV. Qualified Immunity

Defendants also move for judgment on the pleadings on all Counts to the extent that they include requests for damages, based upon Defendants' assertion of qualified immunity. Government officials that perform "discretionary functions enjoy a qualified immunity from suit." *Leaf v. Shelnutt,* 400 F.3d 1070, 1079-80 (7th Cir. 2005). Qualified immunity prevents the recovery of damages in a civil action for claims brought against public officials, if the officials' "actions could reasonably have been thought consistent with the fights they are alleged to have violated." *Id.* In order to determine

whether qualified immunity is applicable prior to trial, a court must determine whether: 1) "[t]aken in the light most favorable to the party asserting the injury,...the facts alleged show the officer's conduct violated a constitutional right" and 2) "the right was clearly established . . . . ," meaning that "it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted." *Id.* (stating that "[a] right is clearly established when '[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right'" and that "[t]he action's unlawfulness must be 'apparent' from pre-existing law"). A court should, if possible "determine early in the proceedings whether qualified immunity will apply." *Id.* at n.7; *see also Delgado v. Jones,* 282 F.3d 511, 516 n.1 (7th Cir. 2002) (explaining that "many qualified immunity determinations are made in the context of summary judgment, where materials outside the pleadings may be considered.").

For the reasons stated above, in regards to the due process claim, the pleadings do not indicate that there was a constitutional violation and therefore, we need not proceed further with the qualified immunity analysis. *See id. Leaf,* 400 F.3d at 1079-80 (stating that "[if no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity."). In regards to the First Amendment discrimination claim and the retaliation claim, based upon a review of the pleadings in the light most favorable to Pierson, we cannot find that no constitutional right was violated. In regards to whether the rights in question were clearly established, Pierson argues that Defendants terminated his employment because of his political affiliation and that the law is clear that under certain situations such conduct is a violation of an employee's constitutional rights. Although, Defendants tout the position statement for the warden position

as a reason why Defendants would deem Pierson's position a policy-making position, there is no indication in the pleadings that Defendants were aware of the position statement. Also, as is explained above, the position statement, is insufficient in and of itself to establish the position's inherent duties and likewise is insufficient to show, at this stage of the proceedings, that Defendants should not have known that they were violating a clearly established constitutional right of Pierson. As the court noted in *Kiddy-Brown* "[i]t has long been clear that the First Amendment forbids politically-motivated patronage dismissals of certain employees." *Kiddy-Brown,* 408 F.3d at 356. Also, as the Court determined in *Kiddy-Brown,* we conclude that the truth of the allegations in the instant action "must be resolved... on a more complete record" and "once the record is developed" we recognize that we may be asked by Defendants "to revisit the issue of qualified immunity." *Id.* at 357. Therefore, based upon the pleadings at this initial stage of the proceedings, we deny Defendants' motion for judgment on the pleadings on the requests for damages for the First Amendment discrimination claim and the retaliation claim.

CONCLUSION

Based on the foregoing analysis, we deny Defendants' motion for judgment on the pleadings on the First Amendment discrimination claim (Count I) and the retaliation claim (Count II). We grant the motion for judgment on the pleadings on the due process claim (Count III). We also deny the motion for judgment on the pleadings on the requests for damages in regards to the First Amendment discrimination claim (Count I) and the retaliation claim (Count II) and grant the motion for judgment on the pleadings on the requests for damages in regards to due process claim (Count III).

/s/ _____
Samuel Der-Yeghiayan
United States District Court Judge

Dated: June 24, 2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case No. 04 C 939

[Filed June 24, 2005]

MARK PIERSON,	)
Plaintiff,	)
	)
v.	)
	)
ROD R. BLAGOJEVICH and	)
ROGER WALKER, JR.,	)
Defendants.	)
	)

DOCKET ENTRY

For the reasons stated in the attached memorandum opinion, defendants' renewed motion for judgment on the pleadings is granted in part and denied in part.

APPENDIX J

Statutory and Constitutional provisions

42 U.S.C. § 1983. Civil action for deprivation or rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the Untied States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

United States Constitution-Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

20 ILCS 415/8a(1)

See. 8a. Jurisdiction A - Classification and pay. For positions in the State service subject to the jurisdiction of the Department of Central Management Services with respect to the classification and pay: (1) For the preparation, maintenance, and revision by the Director, subject to approval by the Commission, of a position classification plan for all positions subject to this Act, based upon similarity of duties performed, responsibilities assigned and conditions of employment so that the same schedule of pay may be equitably applied to all positions in the same class. However, the pay of an employee whose position is reduced in rank or grade by reallocation because of a loss of duties or responsibilities after his appointment to such position shall not be required to be lowered for a period of one year after the reallocation of his position. Conditions of employment shall not be used as a factor in the classification of any position heretofore paid under the provisions of Section 1.22 of "An Act to standardize position titles and salary rates", approved June 30, 1943, as amended. Unless the Commission disapproves such classification plan within 60 days, or any revision thereof within 30 days, the Director shall allocate every such position to one of the classes in the plan. Any employee affected by the allocation of a position to a reconsideration thereof in such manner and form as the Director may prescribe, be given a reasonable opportunity to be heard by the Director. If an employee does not accept the

allocation of the position, he shall then have the right of appeal to the Civil Service Commission.

20 ILCS 415/10(4)

Sec. 10. Duties and powers of the Commission. The Civil Service Commission shall have duties and powers as follows:

(4) To approve or disapprove within 60 days from date of submission the position classification plan submitted by the Director as provided in the rules, and any revisions thereof within 30 days from the date of submission.

80 Illinois Administrative Code § 301.20

It is the responsibility of each agency head to report to the Director any significant changes in the duties of every position within the agency. At the request of an agency, or at the discretion of the Director, a survey, audit, or such other investigation may be deemed necessary by the Director shall be made to determine the proper allocation of any position to a class. Upon written request of an employee, such investigation as may be deemed necessary by the Director shall be made to determine the proper allocation of the employee's position. After making such survey, audit, or other investigation, the Department of Central Management Services shall notify the agency in which such position is located of its decision as to the proper allocation of the position in question. It shall be the responsibility of the head of the agency in which the position is located to notify the incumbent in said position of the decision of the Department of Central Management Services.